Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

Ann Bogren,

Petitioner,

v.

The State of Minnesota; Department of Public Safety; Donald Davis, Commissioner of the Department of Public Safety, in his official capacity; Minnesota State Patrol; Ann Beers, Chief of the State Patrol, in her official capacity;

Lieutenant Thomas Fraser of the State Patrol, personally and individually; and Lieutenant Lori Hodapp of the State Patrol, personally and individually; and Lieutenant Colonel Stephen Mengelkoch of the State Patrol, personally and individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a letter of violation written by a director of the EEOC, on behalf of the Commissioner of the EEOC, finding that the evidence *establishes* that the defendant discriminated against the plaintiff in the terms and conditions of her employment and terminated her for a discriminatory reason, precludes a court from finding that "no reasonable factfinder" could find discrimination.

2. Whether the Eighth Circuit Panel in petitioner's case so far departed from the accepted and usual course of summary judgment proceedings and the summary judgment standard, as confirmed and explicated in *Reeves v. Sanderson*, by crediting all defendants' interested witnesses' evidence and evidence petitioner contradicted, while discrediting all petitioner's evidence, to find that petitioner presented no evidence from which a reasonable factfinder could find discrimination.

PARTIES TO THE PROCEEDING

Petitioner
Ann Bogren

Respondents
The State of Minnesota; Department of Public Safety; Donald Davis, Commissioner of the Department of Public Safety, in his official capacity; Minnesota State Patrol; Ann Beers, Chief of the State Patrol, in her official capacity; Lieutenant Thomas Fraser of the State Patrol, personally and individually; Lieutenant Lori Hodapp of the State Patrol, personally and individually; and Lieutenant Colonel Stephen Mengelkoch of the State Patrol, personally and individually

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eighth Circuit opinion (A-3) is reported at *Ann Bogren v. State of Minnesota, et al.*, 236 F.3d 399 (8th Cir. 2000). The district court opinion (A-21) is included in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on December 22, 2000. The Court of Appeals entered an order denying a timely petition for rehearing and petition for rehearing en banc on February 15, 2001. (A-41).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1981 (A-42)
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42 U.S.C. §2000e *et seq.* (A-49, A-54)

STATEMENT OF THE CASE

The petitioner Ann Bogren brought this action against her former employer, the Minnesota State Patrol, and her former supervisors, claiming race and gender discrimination in her employment in violation of Title VII, and 42 U.S.C. §1981, §1983 and §1985. The petitioner voluntarily withdrew her state claims against the state defendants, and her claims for emotional distress. On April 9, 1999, the Honorable Paul A. Magnuson dismissed the petitioner's claim for tortious interference of contract, and on August 13, 1999, granted the defendants' motions for summary judgment. The Eighth Circuit affirmed.

The petitioner was accepted into the State Patrol Training Academy on November 13, 1994, after successfully completing POCOP (Minnesota Peace Officer Candidate Opportunity Program), a program which she had been invited to attend along with 29 other candidates selected from over 500 applicants. At the Academy, the drill instructors regularly subjected the trainees to a variety of sexually offensive and unwelcome language, and the female cadets to inappropriate touching of their shirts and badges. Heidi Speak, a cadet in the 1995 class, wrote in her evaluation of the academy: "the effectiveness of the State Patrol Academy [could] be improved" by "less condescending, degrading behavior or at least cut it after five or six weeks. Humans, especially people like us who are obviously above others for the State Patrol to consider as employees, do not deserve to be treated like animals."

In an interview with Thelma James, an investigator who questioned the 1995 cadets about sexual harassment in the training academy, the petitioner reported that she believed that the patrol was targeting people for harsh treatment; that they had singled out Cynthia Bell, a woman who had complained about sexual harassment; that the cadets had to endure comments of a sexual nature, which were very

common in the academy; that she was personally harassed about her hair and continually harassed for having gone on a ride-along with another police department; that the Academy was not an environment in which a cadet felt comfortable making a complaint; and that the drill instructors and guest inspectors created a "psychologically intimidating" environment.

The petitioner graduated from the Academy in February of 1995. She was "designated" and "appointed" a sworn, certified "State Patrol Trooper" on February 24, 1995, and began her one-year probationary period, which, according to the Patrol's General Orders, is a period of orientation. In each step of her field training, petitioner progressed satisfactorily and advanced to the next phase, without any extensions in her training. At the completion of phase one, her field training officer, Brian Polansky, documented as the petitioner's "strengths," the following: "Ann is very eager to learn and comprehends new material covered very quickly." Under "weaknesses," he referred to a "few minor traffic violations." His "additional comments" discussed the petitioner's "very nice personality" and ability to "get along well with other partners and [him]self." He added, "she is caring to others' needs and friendly in her actions with motorists." In step two, the petitioner's field-training-officer (FTO), Miller, reported that she was "very strong in the area of officer safety, DWI arrest and process, and report writing." Miller reported no "weaknesses," and added, "Trooper Bogren takes instruction well and has been learning from previous mistakes. Trooper Bogren demonstrated a take charge attitude when dealing with intoxicants and demonstrates a tolerant attitude throughout the DWI process. Trooper Bogren appears to genuinely enjoy her job." In phase three her FTO, Waxberg, wrote, "Trooper Bogren was receptive to training and ideas that were different from others she had received. When she was instructed to do tasks different for safety of troopers or just ease, she would do the

task as instructed. She is willing to listen and learn. She then attempts to do the task as instructed." Under "weaknesses," Waxberg documented that the petitioner "needs more work on Code 3 or high speed driving. She is not yet efficient or comfortable in the area, but did make progress as this step progressed." (A 63-67) In her last step of field training, with Polansky as her FTO again, some tension developed between the petitioner and Polansky. The petitioner found that Polansky subjected her to constant criticism, and held her to a higher standard than the other troopers, reprimanding her for the same performance for which other troopers did not get reprimanded. Also, the petitioner interpreted a remark that Polansky made to her one day as racist. During this phase, Polansky documented that the petitioner committed various traffic violations due to the distractions of "radio traffic, MDT operation, and observing traffic violations." Polansky listed the petitioner's strengths as her understanding of traffic laws, her report writing, and her ability to get along with her partners and the motoring public. (A-66)

As a solo patrol officer, under the supervision of Lieutenant Kutz, the petitioner consistently scored "satisfactory" or above on all of her evaluations. Of 35 scores, she received nine scores of "above average," 24 scores of "satisfactory," and only two "unsatisfactory" scores. On her final three monthly evaluations, she scored all "above average" scores in the areas of "personal characteristics," "communication and interpersonal skills," and "physical appearance and conditioning." (A 68-74) Kutz transferred to St. Cloud on September 20, 1995, and Lieutenant Lori Hodapp assumed command of the 4550 beat, as the supervising lieutenant, on October 2, 1995. In the interim, according to Lieutenant Thomas Fraser, he was the petitioner's supervisor.

On October 22, 1995, when she was not on duty, the petitioner went to the home of Steve Johnson, her boyfriend of two years, for the purpose of requesting the return of her

keys and ending her relationship with him because of his infidelity. Johnson and a woman, Monica Hallman, were at Johnson's home when the petitioner arrived. The petitioner spoke with Johnson in the kitchen, arguing, with the petitioner standing just inside the door. When Johnson left to get the keys, the petitioner picked up some oriental tea cups that she had previously given to Johnson as a gift. Johnson returned with the keys and told the petitioner to put the tea-cups down or he would charge her with theft. The petitioner had her keys in one hand, her other hand on the kitchen door, and she was balancing the tea-cups on her arm. As she attempted to set the cups on the counter, Johnson's dog jumped up on her and she dropped the cups. Three of the four cups broke. Johnson reported the petitioner's breakage of the cups to the Columbia Heights Police Department and to the State Patrol. Officer Schmidt of Columbia Heights came to Johnson's home five minutes after receiving the call, and stayed there for 20 minutes taking Johnson's complaint. Schmidt called the petitioner and talked to her for 20 seconds. The petitioner told Schmidt that she had an argument with Johnson and that she had dropped the cups and they broke. Schmidt told her he would be issuing and mailing her a citation.

Johnson left a message with the patrol for Fraser to call him. Fraser finished his shift at around midnight, at which time he received the message that Johnson had called. He called Johnson that night from his residence, when he was off-duty, and discussed with Johnson the facts of his complaint. Fraser also called Schmidt after he spoke with Johnson, and talked with him when he called back about 1:00 in the morning. Schmidt told Fraser that he had talked to the petitioner for only 20 seconds, and that she told him she was at Johnson's house, they had argued, she had broken some cups, and she left. Whether Fraser knows Schmidt is not clear. When asked in his deposition, Fraser testified, "I lived in Heights. There's several of them I know by face and – but I

don't necessarily know by name, and I don't know if Schmidt was one I would recognize by face or not. But I really didn't know him very well." Finally, Fraser tried to call the petitioner that same evening. "First thing in the morning," Fraser called Menglekoch and reported the complaint to him over the phone. Fraser "even got up early" to make the call. Menglekoch sent the complaint to the Internal Affairs division who sent it back down to be investigated at the district level that same morning, and Menglekoch had already assigned it to Fraser by noon. Internal Affairs sends complaints referred to the department to the district level for investigation where the complaint is not serious. "Serious [complaints] like trooper misconduct" are investigated by internal affairs. As Fraser explained, "That is pretty much how it's handled. Internal affairs decides which ones count and they give numbers to which don't count and then send out to be handled." Fraser determined that Johnson's complaint about the petitioner was "sustained." He also determined that "other misconduct" not in the initial complaint was likewise sustained, referring to his personal conclusion that the petitioner had been "evasive" in the investigation. Fraser recommended to Menglekoch that the petitioner be terminated.

Menglekoch assigned to Hodapp the task of writing a supervisors' report documenting the reasons for the petitioner's termination. Hodapp does not remember writing the report, though she believes that she must have written it because she recognized her writing style. Menglekoch does not remember assigning Hodapp to write it, but he also recognized her writing style. However, another version of the report exists that no one remembers writing either, which appears to be a draft version of the final copy. Some of it is written in the first person, referring to Menglekoch. Menglekoch testified in his deposition that he could not recall if he had written a report that was "similar" to the supervisors' report and "in the same manner" as that report.

Menglekoch's attorney wrote to the petitioner's attorney that "Menglekoch cannot confirm or deny whether he was the author of that document because he simply can't recall whether he wrote it or not. He admits that it's possibly his and acknowledges that there are references in the first-person tense which may refer to him."

The petitioner was notified on November 8, 1995 that she would be fired. She was fired on November 14th. She was in her ninth month of employment as a state trooper. The supervisors' report was dated November 11th, and Fraser's internal affairs report was dated November 3rd. The petitioner was the only officer who graduated from the training academy's 1995 class to be terminated. One other officer, Doreen Genosky, was given the choice of resignation or termination, and chose to resign. She resigned about a week before the petitioner, following an incident that occurred on October 20, 1995, two days before the petitioner's tea-cup incident, for which Fraser had put Genosky on administrative leave. Fraser had threatened to fire Genosky on October 11, 1995, telling her that he was looking at her and another trooper to fire.

On the very weekend petitioner's tea-cup incident occurred, a male trooper was charged with domestic assault for "slamming" his wife into a door. In his internal affairs investigation, the trooper, Bruce Brynell, outright lied to the investigator that the prosecutor had made representations to him that the prosecutor had not made, and told a completely different story to the investigator than the story his wife had told. The investigator, however, said to the trooper's wife in the taped interview, ". . . Bruce has been, from what you're telling me, has been honest with me." In fact, Brynell's wife told the investigator that her husband had "grabbed" her arms to the point of bruising them, and "slammed" her into the door, still holding onto her as she hit the door; whereas Brynell told the investigator, "I placed my hands on her arms. . . and I just in my mind, I just wanted her to get away from

me and I pushed her back, not intending to push her into anything, just kind of just, get away from me, kind of fight or flight type of response." Brynell was charged with 5th degree domestic assault, and pled guilty to a reduced charge. The patrol did not fire Brynell; he received "no disciplinary sanction." (A 76-84)

The Patrol also did not fire Dean Grothem, a probationary trooper accused of "grabbing" and forcefully pushing the neck of a citizen. The patrol did not fire John Korth when he was a probationary trooper and a citizen accused him of "intimidation," "arrogance," and a "threatening attitude," and another citizen accused him of threatening him and grabbing his neck. The Patrol did not fire Mark Kincade for driving while intoxicated during his probationary period, or Tim Peterson who, as a probationary officer, was the subject of a racial discrimination complaint by a citizen who reported that he had yelled at her and treated her improperly and discriminatorily.

The EEOC determined that the Patrol had "inequitably applied rules relating to general working conditions and employment privileges" to the petitioner, and "subjected [the petitioner] to terms and conditions of employment different than those required of her co-workers which created an intimidating, hostile, and offensive environment that led to her discharge." (A 39-40)

ARGUMENT

I. The letter of violation written by a director of the EEOC, on behalf of the Commissioner of the EEOC, finding that the evidence *establishes* that the State defendant discriminated against the petitioner in the terms and conditions of her employment and terminated her for a discriminatory reason, demonstrates that a reasonable factfinder could find discrimination.

The panel concluded that the petitioner did not present "sufficient evidence from which a reasonable fact finder could disbelieve the state's nondiscriminatory explanation for her termination," yet petitioner offered the letter of violation written by Michael Bloyer, Area Director of the EEOC, "on behalf of the Commission," "as to the merits of the [petitioner's] charge" that: (1) "examination of the evidence indicates that ***a violation of the statute has occurred*** because the respondent inequitably applied rules relating to general working conditions and employment privileges to the Charging Party, Ann M. Bogren, which led to her discharge;" (2) "the ***evidence is sufficient*** to show that the Charging Party, a Black female, employed by Respondent from November 1994 until November 14, 1995, was treated differently and discharged;" and (3) the "***evidence establishes*** that the Charging Party has been subjected to terms and conditions of employment different than those required of her co-workers which created an intimidating, hostile, and offensive environment that led to her discharge." (A 39-40) A letter of violation is stronger than a probable cause determination. *See Gilchrist v. Jim Slemons Imports, Inc.* 803 F.2d 1488 (9th Cir. 1986). In petitioner's case, the EEOC did not just conclude that there was probable cause that the Patrol discriminated; the agency found that the evidence "***establishes***" the discriminatory treatment of the petitioner.

Conciliation through EEOC procedures rather than formal court proceedings is the preferred method of settling discrimination disputes. *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221 (10th Cir. 1997); *Moteles v. Univ. of Penn*, 730 F.2d 913 (3rd Cir. 1984). In establishing these procedures, Congress acted on the assumption that "administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases." *Moteles.* If EEOC determinations, especially ultimate determinations that the evidence

"establishes" discrimination, do not at least mean that reasonable minds can disagree about the import of the evidence, the EEOC's conciliation efforts will be frustrated and courts will be burdened with discrimination cases that should never reach the courts. The EEOC will be discredited and its conciliation function by-passed, with employers opting to take their chances in court, where the EEOC's findings will carry no weight.

There is disagreement among the circuits and confusion within the circuits whether an EEOC finding of probable cause demonstrates the existence of a genuine issue of fact on the ultimate question of whether discrimination occurred. In reaching the conclusion that no reasonable fact-finder could disbelieve the state's nondiscriminatory explanation for the petitioner's termination, where the EEOC disbelieved the explanation, the panel failed to follow the precedent of *Bassett v. City of Minneapolis*, 211 F.3d 1097 (8th Cir. 2000), that the EEOC's finding in favor of the plaintiff, while not determinative, "demonstrates that upon distillation of all the evidence presented, reasonable minds could disagree over the material fact of retaliation and intentional discrimination." *Id.* at 1104.

In the Ninth Circuit, in *Coleman v. Quaker Oats*, 232 F.3d 1271 (9th Cir. 2000) *petition for cert. 00-1560,* though the court reasoned that "an EEOC letter is a highly probative evaluation of an individual's discrimination complaint," the court nevertheless held that the EEOC reasonable cause determination did not create a genuine issue of material fact whether the employer discriminated against the plaintiffs. The court, however, failed to acknowledge Ninth Circuit precedent that an EEOC reasonable cause finding is sufficient to preclude summary judgment. In *Gifford v. Atchison, T. & S. F. R. Co.*, 685 F.2d 1149 (9th Cir. 1982), the court held:

> We conclude that Gifford offered sufficient evidence to raise an issue of fact. The district court erred in deciding as a matter of law that Gifford and the two male employees who were not fired were not similarly situated. Gifford's allegations and her opposition to defendants' motion for summary judgment were supported by the "reasonable cause" determination made by the EEOC. The EEOC, after an impartial investigation, found reasonable cause to believe that Gifford had been treated differently than similarly situated male employees. The EEOC's report was sufficient at least to create an issue of fact on this question. It was therefore improper for the trial court to resolve the issue on summary judgment.

Citing for comparison *Gifford* as well as *Mitchell v. Office of Los Angeles County Superintendent of Schs.*, 805 F.2d 844, 847 (9th Cir. 1986), which relied on *Gifford* for the proposition that "an EEOC finding of reasonable cause is sufficient at least to create an issue of fact requiring proceedings beyond the summary judgment stage," the Tenth Circuit ruled to the contrary in *Simms v. Oklahoma ex rel. Department of Mental Health & Substance*, 165 F.3d 1321 (10th Cir. 1999). The *Simms* court held, "when the independent facts before the district court judge fail to establish a genuine issue of material fact, a favorable EEOC letter of determination does not create one." However, the Tenth Circuit, this past January, took the opposite view. In *Cervantes v. Walmart*, 2001 U.S. App. LEXIS 63 (10th Cir.), the court reversed the lower court's grant of summary judgment, finding that the court had erred in failing to even discuss the EEOC's probable cause of discrimination. The court explained, "an EEOC report can be highly probative of the ultimate issues involved." The court relied on *Smith v. Universal Servs, Inc.*, 454 F.2d 154, 157 (5th Cir. 1972) for its holding:

> To ignore the manpower and resources expended on the EEOC investigation and the expertise acquired by its field investigators in the area of discriminatory employment practices would be wasteful and unnecessary.
>
> The fact that an investigator, trained and experienced in the area of discriminatory practices and the various methods by which they can be secreted, has found that it is likely that such an unlawful practice has occurred, is highly probative of the ultimate issue involved in such cases.

The *Cervantes* court concluded:

> Clearly the EEOC report has probative value. On summary judgment, this report, which was already noted in the pretrial order, should have been addressed along with the Colorado Civil Rights Division decision. The court should have explained why it was according no credence to those reports.

In the Fourth Circuit, in *Goldberg v. B. Green Co., Inc.*, 836 F.2d 845 (4th Cir. 1988), the court found that the Commission's findings in favor of the plaintiff were "not sufficiently probative to create a genuine issue of material fact about Green's intent to discriminate on the basis of age." The court's holding was not overbroad, however, but appeared to be limited to a Commission's report that "merely repeats facts which [the plaintiff] himself alleges elsewhere in this case, and then states in conclusory fashion that those facts reflect age discrimination." "Such findings," held the court, "standing alone, are not enough to salvage Goldberg's claim."

The question of whether an EEOC letter of violation or an EEOC determination of reasonable cause creates a genuine

issue of material fact whether the defendant discriminated against the plaintiff, or precludes a court from concluding that no reasonable factfinder could find discrimination, is an important question that the Court has not specifically addressed. However, in *Bassett v. City of Minneapolis*, the court reached its holding that the EEOC reasonable cause determination demonstrates that "reasonable minds could disagree over the material fact of retaliation and intentional discrimination" on the authority of this Court's holding in *Chandler v. Roudebush*, 425 U.S. 840, 863 n.39 (1976). In *Chandler*, the Court held that "prior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence," and thus "it can be expected that. . . many potential issues can be eliminated by stipulation." The Court's holding necessarily recognizes the probative value of an EEOC reasonable cause finding. If the EEOC finding has probative value of the ultimate question of discrimination, it must then at least create a genuine issue of material fact whether the employer discriminated. Petitioner respectfully submits, on the basis of the Court's holding in *Chandler* and the confusion and disagreement in the circuit courts concerning the worth of the EEOC's determinations, that the effect of an EEOC finding for the plaintiff (whether a letter of violation or a reasonable cause finding) on a summary judgment proceeding is an important question of federal law that has not been, but should be, settled by this Court.

II. The Eighth Circuit Panel in petitioner's case so far departed from the accepted and usual course of summary judgment proceedings and the summary judgment standard, as confirmed and explicated in *Reeves v. Sanderson*, by crediting all defendants' interested witnesses' evidence and evidence petitioner contradicted, while discrediting all petitioner's evidence, to find that petitioner presented no evidence

from which a reasonable factfinder could find discrimination.

A. The Panel's Method Of Analyzing A Summary Judgment Motion, In Violation Of Reeves v. Sanderson, Allows A Court To Dispose Of Even The Strongest Case Of Employment Discrimination.

The panel decision conflicts with the U.S. Supreme Court's mandate, set forth in *Reeves v. Sanderson*, 120 S. Ct. 2097 (2000), that courts deciding, as a matter of law, whether reasonable minds could find that an employer terminated the plaintiff for a discriminatory reason, must not weigh the evidence, must disregard all evidence favorable to the employer that the jury is not required to believe, and must give credence to the plaintiff's evidence and only to the evidence of the employer that is "uncontradicted and unimpeached, at least to the extent that it comes from disinterested witnesses." *Id.* at 2110. The panel in this case weighed the evidence, credited the defendant's evidence that petitioner contradicted, and credited the defendant's evidence that came from interested witnesses, that is, the defendants. *See Tolbert v. Queens College*, 2001 U.S. App. LEXIS 2595 (2nd Cir.) (Defendants are not disinterested witnesses.). The panel discredited all the evidence of pretext petitioner put forth establishing pretext under the precedents of this Court and the Eighth Circuit, specifically, evidence of: the EEOC determination; the State's misrepresentation of the facts to the EEOC; the Patrol's discriminatory policies and practice with respect to minority employment; statistical evidence; evidence of the discriminatory animus and actions toward minorities of the supervisors who terminated her; contradictions between defendants' accusations against petitioner and her performance reviews and scores; discrepancies between the State's admissions that petitioner was never reprimanded, disciplined, nor counseled for the

deficiencies with which she was charged; evidence that refuted specific allegations made against petitioner in a supervisors' report justifying her termination; comparative evidence of troopers who engaged in conduct more serious than petitioner's and yet were not terminated nor even disciplined; and comparative evidence of troopers whose word the Patrol accepted though the Patrol failed to credit petitioner's word.

In ruling that petitioner presented no factual issue whether defendants discriminated against her, in the face of all of petitioner's evidence establishing pretext, the panel so far departed from the accepted and usual course of summary judgment proceedings. This departure, along with the exceptional circumstances and importance of this case due to petitioner's status as the only black female trooper in the history of the State Patrol, juxtaposed with the "first and foremost" reason for her termination, according to the defendant in its representation to the EEOC – dropping $9.00 teacups at the home of her former boyfriend, while off-duty, when her boyfriend's dog jumped on her – creates a compelling reason for this Court to grant review. (A 99-102) As it stands, the panel's decision will negatively impact the plight of minority employees and the law of the Eighth Circuit. In crediting the Patrol's evidence while discrediting all of the petitioner's evidence, the panel decision, in addition to violating *Reeves*, sanctions the discriminatory atmosphere of the Patrol and stamps a seal of approval on the termination of the only black female in its history, in the midst of her successful progression through her probationary period, as documented by the Patrol's own system of performance evaluation. Fired on the heels of an intense and immediate internal-affairs investigation of her off-duty act of dropping some teacups – which the Patrol admitted was "nothing more than an argument, not even a loud argument, between two people who had been dating, and in the course of that argument some glasses were broken," and "[the petitioner's]

conduct was nothing more than that" – petitioner is the ultimate example of an employer's manipulation of its internal procedures to justify its discrimination of women and minorities. (A 103-114) If petitioner's evidence of discrimination by an organization which, according to Mel Lockhart, an affiant in petitioner's case and 22-year African American veteran of the State Patrol, subjects its minority troopers to a "choking" atmosphere of discrimination, is not enough to create a genuine issue of material fact, then no evidence, short of an employer's statement that it fired an employee because she was black, will ever be enough.

It is not the law that an employment discrimination plaintiff, to survive summary judgment, must have "eyewitness testimony as to the employer's mental processes." *Reeves*. Nor is it the law that a court may give credence to every piece of evidence the employer offers while rejecting in full all of a plaintiff's evidence of pretext. As Judge Lay observed in his dissent in *Heaser v. The Toro Co.*, 2001 U.S. App. LEXIS 7524 (8th Cir.), so long as a court's method of analyzing motions for summary judgment is to "ignore the evidence presented by [the plaintiff]" and give "sole credibility to the evidence presented by [the employer]," the employer "will always win." The employer should only win, however, when "all the evidence point[s] one way and [is] susceptible of no reasonable inferences sustaining the position of the non-moving party." *Id.* The error of the panel's decision in petitioner's case is more far-reaching than just a misapplication of the law to the facts; the error is in the court's method – in its violation of Reeves, its departure from "settled principles of law [that] need no citation," *Id.*, and its utilization of Rule 56 to legislate away Title VII.

B. The Panel Ignored The Determination Of The EEOC That The Evidence Establishes That Defendants Discriminated Against The Petitioner.

The panel concluded that the petitioner did not present "sufficient evidence from which a reasonable fact finder could disbelieve the state's nondiscriminatory explanation for her termination," yet petitioner offered the determination of Michael Bloyer, Area Director of the EEOC, "on behalf of the Commission," "as to the merits of the [petitioner's] charge" that defendant discriminated against petitioner. (A 39-40)

C. The Panel Ignored Defendant's Misrepresentations To EEOC.

The panel failed to consider the State's misrepresentation to the EEOC that "first and foremost, [petitioner] was arrested following a domestic incident involving her former boyfriend." (A 99-102) The patrol admitted in deposition testimony that this statement was false. (A 103-108) The petitioner was not arrested. The patrol also admitted that the tea-cup incident was "nothing more than an argument, not even a loud argument, between two people who had been dating, and in the course of that argument some glasses were broken," and "[the petitioner's] conduct was nothing more than that." (A 109-111) The State's misrepresentation to the EEOC, by itself, is "sufficient evidence to find that the employer's asserted justification is false," and to allow the trier of fact to "reasonably infer from the falsity of [this] explanation that the employer [was] dissembling to cover up a discriminatory purpose." *Reeves.*

D. The Panel Ignored Petitioner's Evidence Of Defendant's "General Policy And Practice With Respect To Minority Employment."

The panel concluded that the petitioner presented "no independent evidence [beyond her statistical evidence] to support a finding of pretext"; however, the panel ignored petitioner's evidence of the state's "general policy and practice with respect to minority employment," which the Court has held "may be relevant to any showing of pretext," *McDonnell-Douglas v. Green,* 411 U.S. 792, 804-805 (1973), and the Eighth Circuit has held "may well illustrate that the employer's asserted reasons for disparate treatment are a pretext for intentional discrimination," and "may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive." *Hawkins v. Hennepin Technical Center,* 900 F.2d 153 (8th Cir. 1989); *Patterson v. Masem,* 774 F.2d 251 (8th Cir. 1985). *See also Anderson v. Genuine Parts Company, Inc.,* 128 F.3d 1267, 1272 (8th Cir. 1997). (An employer's prior acts of discrimination may show the employer's state of mind at the time of the adverse employment action in question.) Petitioner presented evidence of the Patrol's discriminatory treatment of women through the affidavits of women who had brought charges of discrimination against the Patrol. She presented evidence of the discriminatory attitude toward women of Fraser (who conducted the petitioner's internal affairs investigation, concluded the petitioner was lying, and recommended her termination), including Fraser's comment on March 13, 1995 (the petitioner was fired in November 1995) that Colonel Anne Beers, Chief of the State Patrol, was "incompetent," "had no leadership experience," and would be a better supervisor if someone would "take care of her"; Fraser's reference to Pamela Liebl, a former Minnesota trooper, in his deposition in Doreen Genosky's case, as a "blithering idiot;" and his disparate treatment of Doreen

Genosky, as evidenced by his statement to her that he knew that others were making mistakes, but that he was watching her, and was looking to fire her. Petitioner also presented the affidavit of Liebl describing Fraser's discriminatory attitude toward all women in the Patrol, and detailing Fraser's discriminatory actions against Liebl that caused her termination. (A 127-129) The petitioner offered evidence of the discriminatory animus toward minorities of Hodapp (who wrote the Supervisor's Report recommending the petitioner's termination) and Hodapp's frustration of the purposes of the Patrol's Minority Hiring and Recruitment Group, as set forth in the affidavit of Melvons N. Lockhart, a black male state trooper who filed a complaint of racial discrimination against Hodapp in 1998. (A 130-133)

The panel also failed to credit petitioner's statistical evidence, though the Court held in *McDonnell Douglas* that "statistics as to [an employer's] employment policy and practice may be helpful to a determination whether [the employer's adverse action] conformed to a general pattern of discrimination against blacks." *Id.* at 805. Petitioner presented evidence that she was the only black female trooper ever. She presented evidence of the scarcity of black troopers in the Patrol (In 1997, three of 450 troopers were African American (A-126)). *See Kim v. Nash Finch Co.*, 123 F.3d 1046, 1059 (8th Cir. 1997). She offered evidence that Gene Shockency, the first African American Minnesota trooper, filed a discrimination lawsuit against the Patrol in 1981, contending he was the victim of harassment and discrimination, and had been denied promotions, discriminated against in job assignments, and subjected to "unfounded and unsupported allegations of misconduct" by his superiors. The petitioner provided evidence of State Representative Andy Dawkins' "alarm" and "deep concern" in 1997 that the Patrol had not hired as a permanent State Trooper "a single new African American since 1977" – "Not one in twenty years. It is so startling as to seem unbelievable,

but it is, in fact, the truth." (A-126) The petitioner also presented evidence of the Patrol's 1996 recruitment class comprised of 28 ***white males.*** (The petitioner was fired in November of 1995.) All this evidence the panel ignored.

The panel further ignored the affidavit of Mel Lockhart, a former African American Minnesota State Patrol trooper, and Lockhart's letter to the EEOC in 1998. Lockhart asserted in his affidavit that throughout his 22 years as a Minnesota trooper he was "frequently subjected to a work environment by the State Patrol that was offensive, hostile, and discriminatory to [him] because of [his] race and color." According to Lockhart, "the State Patrol has been callously indifferent to the racially discriminatory conduct occurring within the organization during that time," and "other persons of color" have told him of the racially discriminatory conduct that they have experienced in the Patrol. In a letter to the EEOC, Lockhart gave an unsettling, moving account of the day-to-day mistreatment he suffered and endured in the Patrol. Never wanting to sue, always struggling for change, Lockhart had hoped that he could pave the way towards a brighter future for minority troopers. He wrote his letter at the close of his career with the Patrol, finally relinquishing his "blind hope" for equality and "blind faith" in an organization that had "left [him] choking in the same discriminatory atmosphere for 22 years." (A 130-133)

E. The Panel Failed To Consider Evidence Raising Fact Issues Regarding The Truth Of The Deficiencies Asserted Within Petitioner's Performance Evaluations.

In *Fisher v. Pharmacia*, 225 F.3d 915 (8th Cir. 2000), the Eighth Circuit held that negative performance evaluations may be a pretext for discrimination where a fact issue is raised regarding the truth of the deficiencies asserted within the evaluations. In *O'Bryan v. KTIV*, 64 F.3d 1188 (8th Cir. 1995), the court held that a plaintiff does not have to directly

disprove the exact reasons for her termination, but can prove pretext through evidence that indirectly discredits those reasons. These holdings are nothing more than this Court's affirmation in *Reeves* that "proof that the defendant's explanation is unworthy of credence. . . is probative of intentional discrimination."

Three days after the petitioner was notified of her termination, the patrol documented in a Supervisors' Report alleged performance problems which had never been raised before, were not supported by the petitioner's performance record, and were plainly contradicted by her record and by specific reports and documents in her file. The panel, however, concluded that petitioner presented no evidence "related to the [supervisors'] report's preparation which would cause a fact finder to question the explanation offered by the state." In reaching its conclusion, the Panel paid no attention to petitioner's evidence contradicting the accusations the Patrol put forth in the supervisor's report justifying her termination. The Patrol accused the petitioner of being "discourteous" and "overbearing" on the phone to a citizen reporting a hit and run accident; however, the petitioner refuted this allegation through a letter from the investigator of the accident relaying to the petitioner the gratefulness of the very citizen whom the Patrol alleged the petitioner had treated so disrespectfully and angrily. (*See Keathley v. Ameritech Corp.*, 187 F.3d 915 (8th Cir. 1999), at 923 – court found similar factual situation – Ameritech accused Keathley of "badgering" an employee in front of client, but client wrote recommendation praising Keathley's professionalism – supported finding of pretext.)

The Patrol accused the petitioner of an "immediate and apparent poor attitude toward the Minnesota State Patrol and its employees," yet, the petitioner was commended in her performance reviews for being "caring to others' needs" and "friendly in her actions with motorists," having a "very nice personality," "getting along well with other partners and

[Polansky]," and "getting along with the motoring public." (A 64-67) The Patrol also accused the petitioner of an "inability to accept constructive criticism," but the petitioner's training officers said she was "receptive to training and ideas that were different from others she had received," that she "took instruction well," was "willing to listen and learn," "very eager to learn," and "when she was instructed to do tasks different for safety of troopers or just ease, she would do the task as instructed." (A 64-67) The Patrol accused the petitioner of "poor anger management" and a lack of control over her temper," but the petitioner received scores of above average in her final three monthly evaluations in the category of "communication and interpersonal skills," described as the "ability to communicate orally, get along with others (Human Relations); deal effectively with the public; to withstand constructive criticism; and work under pressure or stress." Petitioner likewise received scores of above average in her final three monthly evaluations in the category of "personal characteristics," which refer to the characteristics of "personality, temperament, disposition, assertiveness, diplomacy, tactfulness, integrity, dedication, conscientiousness, objectivity, emotional stability, and sensitivity and concern for others," and "those qualities necessary to work and get along well with fellow employees." (A 68-74, A 156-157) The panel ignored all of this evidence and even ignored the Patrol's admissions and answers to interrogatories that the Patrol never counseled nor disciplined the petitioner concerning any problems with anger, any problems addressed in the supervisors' report, or any infraction of Patrol rules or regulations. (A 158-162)

While not accepting the plaintiff's facts as true, as required on review of summary judgment, the panel credited evidence the defendant offered that was contradicted by the record. For example, the panel credited the defendant's evidence that the petitioner "developed an antagonistic relationship with her primary FTO, [Polansky]," even though

the petitioner presented evidence that Polansky, at the time of the alleged antagonism, wrote in his evaluation of the petitioner that she was "easy to get along with and gets along with her partners, including the motoring public." (A 63-67) The panel also credited the defendant's version that the petitioner's "driving problems continued to be a concern" in her probationary period, though the petitioner received scores of "satisfactory" in the category of "Motor Vehicle/ Equipment Operation and Maintenance" for the three months preceding her termination, and had only one accident during the periods of her field training and her solo patrol, in which she hit a metering ramp light pole, and no one was injured, no other car was even involved, and there was no damage to her squad car. Additionally, the panel failed to credit petitioner's evidence of her commendation in the training academy for her ***"outstanding driving skills, as reported by [the] driving school instructors."*** (A 163-164)

The panel also credited the defendant's representation (in after-the-fact affidavit testimony of Kutz) that the petitioner "was hesitant and had to be coaxed" to make an accident report of the light pole incident, and that petitioner had told Kutz there was no damage to her squad when actually there was damage. But the panel ignored the evidence of petitioner's report dated the day of the accident, and Kutz's follow-up report in which Kutz drew no conclusion that the petitioner had to be coaxed to make the report and no conclusion that her squad car had been damaged. Kutz discussed a trooper's accusation that the petitioner did not want to report the accident because – significantly – her squad car ***had no damage***. (*See also* notes by EEOC investigator of interview with Lieutenant & Assistant Commander Gary Peper, relaying Peper's statement that he looked at the petitioner's squad car from the meter accident and saw ***"no damage to the vehicle.***") (A 178-182)

Finally, the panel credited the defendant's explanation that the petitioner was not accountable and might present a

disciplinary problem after certification, where the accountability accusation was based only on the light pole incident and the word of a white female trooper, and the disciplinary concern was based upon the word of the white ex-boyfriend. In assuming the truth of the defendants' allegations that depended upon the truth of the white female trooper's and white ex-boyfriend's allegations, the panel never even considered evidence petitioner offered that white probationary officers were the subjects of citizen complaints of angry, aggressive, or hostile conduct, and yet no other officer was disbelieved as the petitioner was disbelieved. This evidence showed that where the investigator concluded it was the citizen's word against the officer's word, the officer was presumed to be telling the truth and no disciplinary action was taken. (A 165-169) In petitioner's investigation, however, Fraser accepted Johnson's word over petitioner's, in spite of Johnson's obvious vindictive motive in reporting petitioner to the police and to the State Patrol when she ended their relationship, and in spite of Johnson's more than obvious lack of credibility in his interview in Fraser's investigation.[1]

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[1] An example of the lack of credibility of Johnson in his interview is the following:

TF Ok, she threw them one at a time or
SJ No she threw them all
TF All at once
SJ All at once.
TF Ok, was the dog inside the house at this time?
SJ **The dog was inside the house**. (emphasis added)
TF Ok, was the dog jumping on her?
SJ The dog he's real friendly he likes to be petted by everybody, so he was probably trying to be petted.
TF Ok,
SJ But as far as jumping on her uh no
TF The dog didn't jump on her?
SJ He might have what he does is he likes to jump up on people and put his paws around you like he's hugging you, when he was a puppy he would go ahead and you know jump up on you just to be petted.

Fraser also accepted Johnson's word where it conflicted with the word of Monica Hallman, who had no obvious vindictive motive to lie. The panel, however, never considered whether Fraser's reliance on Johnson's credibility could have been discriminatory. Nor did the panel even question Former Chief Michael Chabries' admitted reliance on the word of Johnson in making his decision to terminate the petitioner. (A 170-175) *See Thomas v. Eastman Kodak,* 183 F.3d 38 (1st Cir. 1999) (discussing subconscious discriminatory biases and attitudes based on stereotypic beliefs). And though the panel credited defendants' evidence that other probationary troopers' complaints were unsustained, the panel failed to consider that petitioner's complaint was sustained only because she was not believed and Johnson was.

F. The Panel Failed To Consider Petitioner's Comparison Evidence.

The panel gave no weight to petitioner's comparison evidence, in part because, according to the panel, "the record evidence upon which Bogren relies does not establish that the five officers were probationary troopers," and a party opposing summary judgment may not rest upon the mere allegations or denials of the pleadings." ***The State did not even raise this argument.*** The State never disputed the probationary status of these officers and did not "concede," as the panel suggests, that some probationary troopers were probationary, as opposed to others who were not. The State merely chose to respond, in the context of "for example," to

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TF Ok, the question I guess the question is did the dog jump on her and that then forced her to drop them?

SJ **No, no not at all not at all in fact the dog wasn't even around. I think the dog was either I let the dog outside by this point of it in time, or no the dog wasn't even between us at that time.** (Emphasis Added)

some of petitioner's comparisons and not to others. (A 176-177) Furthermore, Chief Chabries' affidavit clearly acknowledges "by name" that the probationary officers petitioner compared herself to were indeed probationary. (A 170-175)

The panel also discounted the petitioner's comparisons to probationary troopers based upon the panel's finding that the troopers did not engage in conduct of comparable seriousness to the petitioner's conduct. In reaching this conclusion, the panel did not follow the Court's directive in *McDonnell Douglas*, at 804, and *McDonald v. Santa Fe Trail*, 427 U.S. 273, 283 (1976), that a plaintiff's comparables only have to have engaged in conduct of "comparable seriousness," and that "of course, precise equivalence in culpability between employees is not the ultimate question" in demonstrating the pretext of the employer's asserted reasons. The panel also did not apply the Eighth Circuit's admonition in *Lynn v. Deaconess,* 160 F.3d 484 (8th Cir. 1998), that the court must look beyond the "labels" attached to the employee's conduct. Though the panel labeled the petitioner as having received a "criminal citation," the petitioner's underlying conduct, which sparked the instantaneous internal affairs investigation and caused her discharge, is glaringly ridiculous. She dropped teacups at her boyfriend's house when the boyfriend's dog jumped on her. She was at the house off-duty to ask for the return of her keys and end the relationship because of the boyfriend's infidelity. Whether this conduct, constituting the "first and foremost" reason for the petitioner's termination, is of greater seriousness than the conduct of, for example, the probationary officer who received two citizen complaints of intimidating and threatening conduct while on-duty and told his supervisor he expected a third citizen complaint, or of greater seriousness than the conduct of the probationary trooper driving while intoxicated and showing up at the scene of an accident, or the probationary trooper who "grabbed" the citizen's neck and forcefully pushed him forward – at the very

least creates a genuine issue of material fact, requiring a weighing of the evidence by the jury, not the court. (A 85-98).

Finally, the panel discounted petitioner's comparisons to nonprobationary troopers, which discredit Chief Beers' affidavit that "all law enforcement personnel [must] remain law abiding in order to foster public respect and confidence in the State Patrol," and demonstrate, to the contrary, the Patrol's lenient treatment and forgiving attitude toward troopers who embarrass and disgrace the Patrol, engaging in conduct ranging from a trooper "slamming" his wife into a glass door on the very weekend the petitioner dropped the teacups and receiving "no discipline," to a married trooper having sex in the car with another woman while on duty, to an accident reconstructionist trooper falsifying accident reports, receiving kickbacks from lawyers for accident victim referrals, and lying under oath about his criminal conduct, whom the Patrol did not fire because he was "worth saving." In reaching its conclusion that these troopers were not similarly situated to the petitioner, the panel did not credit the defendant's own deposition testimony that probationary troopers are held to the ***same standards*** as nonprobationary troopers; and did not consider the totality of the petitioner's evidence of pretext to apply the law of *Scott v. County of Ramsey,* 180 F.3d 913, 917 (8th Cir. 1999) that a "strong showing" of "similarly situated" is only required where the petitioner's *sole* evidence of pretext is the comparisons.

CONCLUSION

The Patrol's termination of the petitioner for accidentally dropping a $9.00 set of teacups, off-duty, in the wake of Mel Lockhart's 22-year battle against discrimination, is a blatant display of disparate treatment and an affront to the minority troopers of the Patrol. The broken teacups stand as a striking symbol of the shattered hopes and broken dreams of Mel Lockhart and other minority troopers who trusted the Patrol to

protect them from discrimination, only to be left "choking" in an atmosphere in which white male troopers who disgrace the Patrol are easily forgiven and valued, while dedicated, conscientious minority troopers, wrongfully accused and fired, are not deemed "worth saving."

The Eighth Circuit panel's rejection of all of petitioner's evidence of pretext, without so much as a glance at the discriminatory atmosphere that has permeated the Patrol for 22 years, can only serve to perpetuate that atmosphere. In reaching its conclusion that petitioner presented "no" evidence of pretext or discrimination, the panel not only failed to give credence to petitioner's evidence; the panel failed to give credence to Mel Lockhart, to Pamela Liebl, and to the other affiants in petitioner's case. The panel also failed to give credence to Eighth Circuit and Supreme Court precedent and doctrine. Additionally, in finding that no reasonable factfinder could conclude that the Patrol discriminated against the petitioner, the panel failed to give credence to the EEOC and to Director Michael Bloyer and to the investigators who analyzed and examined petitioner's case. The petitioner respectfully submits that the panel so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 99-3516MNMI

Civil 98-880 (PAM/JGL)

Ann Bogren,	*	
	*	
Appellant,	*	
	*	
v.	*	Appeal from the United
	*	States District Court for the
State of Minnesota;	*	District of Minnesota
Minnesota Department of	*	
Public Safety; Donald	*	
Davis, Commissioner of	*	
the Department of Public	*	
Safety, in his official	*	
capacity; Minnesota State	*	
Patrol; Ann Beers, Chief of	*	
the State Patrol, in her	*	
official capacity;	*	
Lieutenant Thomas Fraser	*	
of the State Patrol,	*	
personally and	*	
individually; Lieutenant	*	
Lori Hodapp of the State	*	
Patrol, personally and	*	
individually; Lieutenant	*	
Colonel Stephen	*	
Mengelkoch of the State	*	
Patrol, personally and	*	
individually,	*	
	*	
Appellees.	*	
	*	

Arne Carlson, *

Movant. *

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

December 22, 2000

A true copy.

ATTEST: s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-3516

Ann Bogren,	*	
	*	
Appellant,	*	
	*	
v.	*	
	*	
State of Minnesota; Minnesota Department of Public Safety; Donald Davis, Commissioner of the Department of Public Safety, in his official capacity; Minnesota State Patrol; Ann Beers, Chief of the State Patrol, in her official capacity; Lieutenant Thomas Fraser of the State Patrol, personally and individually; Lieutenant Lori Hodapp of the State Patrol, personally and individually; Lieutenant Colonel Stephen Mengelkoch of the State Patrol, personally and individually,	*	Appeal from the United States District Court for the District of Minnesota.
	*	
Appellees.	*	

Submitted: June 16, 2000
Filed: December 22, 2000

Before LOKEN, ROSS, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

Ann Bogren, a former probationary trooper with the Minnesota State Patrol, brings this action against the state alleging she was discriminated against on account of her race and gender and retaliated against in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994). She also alleges claims pursuant to 42 U.S.C. §§ 1981, 1983 and 1985 against three state patrol employees in their individual capacities. Upon motions by the defendants, the district court[1] granted summary judgment on Bogren's federal law claims, and she appeals. We affirm.[2]

I.

Bogren was accepted into the Minnesota State Patrol Academy in November 1994 through a program designed to recruit women and minority applicants into the patrol.

[1] The Honorable Paul A. Magnuson, Chief Judge, United States District Court for the District of Minnesota.

[2] Bogren also brought claims against the state pursuant to the Minnesota Human Rights Act (MHRA), Minn. Stat. Ann. §§ 363.01-363.15 (West 1991), and common law negligence claims against all defendants. The district court dismissed the MHRA claim pursuant to the parties' stipulation and declined supplemental jurisdiction of the negligence claims after granting summary judgment on Bogren's federal law claims.

Bogren graduated from the academy in February 1995, the first black female to do so. Around the same time, the Minnesota Department of Public Safety launched an investigation into the training environment at the academy. The investigation was spawned by complaints from two former female cadets that academy instructors engaged in sexually harassing and discriminatory conduct. Bogren was interviewed during the investigation but did not identify any incidents where she was harassed or discriminated against.

Following her graduation from the academy, Bogren began the patrol's phased field training program. In general, her field training officers (FTOs) provided favorable reports on her performance, but more than one identified her driving skills as an area requiring improvement. Her FTOs commented on her ability to comprehend material quickly and to get along with others, although by the end of her field training period Bogren had developed an antagonistic relationship with her primary FTO, Trooper Brian Polansky. According to Polansky, Bogren's driving performance regressed during the final phase of her field training period. He reported that Bogren committed traffic violations on an almost daily basis, despite his instruction on the necessity of avoiding such violations.

Despite Polansky's concerns over her driving skills, Bogren advanced in May 1995 beyond the field training program, was assigned a patrol car and began solo patrol. As a solo probationary patrol officer, Bogren generally received above average or satisfactory marks from her initial supervising lieutenant, Lieutenant Al Kutz, yet her driving problems continued to be a concern. On May 24, 1995, Bogren struck a metering light with her patrol car, knocking the light over. Another trooper, who happened upon Bogren and the downed metering light, asked Bogren how the light was knocked over. Bogren admitted that she struck the light, but when the officer informed Bogren that she needed to file an accident report with the patrol, Bogren was hesitant and

had to be coaxed to make the report. Although Bogren filed the report the same day, the trooper reported to Kutz that she had to convince Bogren to make the report and that Bogren was not happy about it. Kutz later questioned Bogren about the light and specifically asked whether any damage occurred to her patrol car. Bogren denied damage but upon Kutz's inspection he noted that there was some. Bogren was also involved in an incident in August 1995 in which she made a U-turn on an interstate entrance, causing two other vehicles to crash.

On the evening of October 22, 1995, Bogren, while off-duty, went to the home of her former boyfriend, Steve Johnson, to retrieve a set of keys. While in Johnson's home, Bogren attempted to take a set of oriental tea cups she had previously given Johnson, and an argument ensued. During the argument, according to Bogren, Johnson's dog jumped up on her, causing her to drop the cups. She then left, and Johnson called the local police department to report the cup-breaking incident. He also called the patrol office and left a message complaining about Bogren's conduct.

A local police officer responded to Johnson's call. Johnson told the officer that Bogren threw the cups at his feet. The same officer later called Bogren to ask her about the incident. Bogren admitted to the officer that she was at Johnson's home, that an argument occurred, and that cups were broken. The officer informed Bogren that he would be issuing and sending her a citation. In the officer's report of the incident, he noted that Bogren informed him that she threw down the cups, although Bogren denies ever making such an admission. Bogren received a citation for criminal damage to property.

Lieutenant Thomas Fraser, the patrol supervisor on duty the night of the incident, returned Johnson's call around midnight to discuss the complaint against Bogren. He also contacted the local police officer who responded to Johnson's call. The next morning, Fraser relayed Johnson's complaint

to his supervisor, Captain Stephen Mengelkoch, who in turn filed a complaint with the patrol's internal affairs division, reporting a charge that Bogren allegedly engaged in conduct unbecoming an officer. The task of investigating the complaint was ultimately assigned to Fraser. Fraser conducted taped interviews with Bogren, Johnson and a female companion of Johnson's who was at Johnson's home on the night of the incident. In his report, Fraser concluded that the charge of conduct unbecoming an officer was sustained. He further reported that Bogren was "untruthful and evasive" during her taped interview with him and that his investigation revealed Bogren had trouble controlling her anger.

Following his investigation of the incident at Johnson's home, Fraser recommended to Captain Mengelkoch that Bogren's employment with the patrol be terminated. Captain Mengelkoch agreed and assigned Lieutenant Lori Hodapp the responsibility of preparing a supervisors' report documenting the reasons for Bogren's termination. The final decision to terminate Bogren was made by Michael Chabries, Chief of the Patrol. Chabries stated in an affidavit that he made the termination decision based on conversations with and reports by Hodapp, Fraser and Mengelkoch. Bogren was notified of the termination decision on November 8, 1995, and was ultimately terminated on November 14,1995. Shortly thereafter, Bogren pleaded guilty to the reduced charge of petty misdemeanor criminal damage to property.

II.

We review a district court's issuance of summary judgment de novo, applying the same standards as those employed by the district court. See Callas Enters., Inc. v. Travelers Indem. Co. of Am., 193 F.3d 952, 955 (8th Cir. 1999). Under Fed. R. Civ. P. 56(c), "[s]ummary judgment is proper if the evidence, viewed in the light most favorable to

the nonmoving party, demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Lynn v. Deaconess Med. Ctr.-W. Campus, 160 F.3d 484, 486 (8th Cir. 1998).

A. Discriminatory Discharge

Bogren advances theories of discriminatory discharge and hostile work environment in support of her Title VII claims against the state. As the district court recognized, her Title VII discriminatory discharge claim is analyzed under the well-recognized McDonnell-Douglas burden-shifting framework. See Roark v. City of Hazen, 189 F.3d 758, 761 (8th Cir.1999) (citing McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). To survive summary judgment, a plaintiff must first demonstrate a prima facie case of discrimination. See id. A prima facie showing creates a legal presumption of unlawful discrimination and shifts the burden to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination. See O'Sullivan v. Minnesota, 191 F.3d 965, 969 (8th Cir. 1999). If the defendant presents a nondiscriminatory reason, "the presumption of discrimination drops from the case" and the burden reverts to the plaintiff to show that the defendant's proffered reason for her termination is pretextual. Id. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Following the Supreme Court's recent decision in Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2108-09 (2000), a plaintiff's prima facie case of discrimination, combined with sufficient evidence from which a reasonable fact finder could disbelieve an employer's nondiscriminatory explanation and make the ultimate fact-finding that illegal discrimination occurred, may form the requisite evidentiary

basis upon which to submit to a jury the question of an employer's intentional, unlawful discrimination.[3]

The district court assumed, as we do on appeal, that Bogren set forth sufficient evidence to support a prima facie case of discriminatory discharge. The court concluded, however, that she failed to establish a genuine issue that the state's proffered reason for her termination was a pretext for discrimination. After a thorough review of the record, we agree with the district court and conclude Bogren has not demonstrated that the state's proffered nondiscriminatory reason for her termination is pretextual.

The state meets its burden of advancing a legitimate, nondiscriminatory reason for Bogren's termination from her probationary status. It contends Bogren's termination was triggered by the incident at Johnson's home, but that the decision was based on a combination of considerations, including: 1) Bogren's conduct at Johnson's home; 2) her poor driving performance; 3) concerns over her accountability; 4) her evasiveness during the investigation of Johnson's complaint; and 5) concern that she might present a disciplinary problem after completion of her probationary period. We find sufficient evidence in the record to support the state's proffered explanation. Consequently, any presumption of discrimination "drops out of the picture." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993).

Bogren therefore bears the burden to produce sufficient evidence from which a reasonable fact finder could conclude that the state's explanation is pretextual. As proof of pretext, Bogren presents evidence that white male troopers were not treated as harshly when disciplinary or performance issues arose in the past. While we recognize that instances of disparate treatment may be enough to present a jury question

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[3] Although Reeves involved an Age Discrimination in Employment Act case, the reasoning is equally applicable in the Title VII context, within which the McDonnell-Douglas framework initially arose.

of whether an employer's proffered explanation is pretextual, Bogren must show that these other troopers were "similarly situated [to her] in all relevant respects." Lynn, 160 F.3d at 487. The district court rejected Bogren's reliance on comparable-trooper evidence because, with the exception of one officer, all of the troopers to whom Bogren compared herself were beyond the probationary period and were thus governed by a collective bargaining agreement. The court reasoned the collective bargaining agreement, with its attendant grievance procedures, would create a different response by the patrol in disciplining or terminating those officers.

We agree with the premise underlying the district court's conclusion; troopers beyond the probationary period are not similarly situated to a probationary trooper. See Blanding v. Pennsylvania State Police, 12 F.3d 1303, 1309-10 (3d Cir. 1993) (recognizing that tenured troopers are not similarly situated to probationary troopers); see also Ghane v. West, 148 F.3d 979, 982 (8th Cir. 1998) (rejecting comparisons to similarly-situated, nonprotected employees because the comparable employees were not probationary employees and because their conduct did not rise to the same level as the plaintiffs). Consequently, assuming nonprobationary troopers were treated more favorably than Bogren, we do not find that fact probative of whether the state's explanation is pretextual.[4]

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[4] Bogren attempts to show there is little difference between herself and the nonprobationary troopers, asserting that she could only be terminated by the patrol for just cause as specified in Minn. Stat. Ann. § 299D.03 subd. 8 (Supp. 2000). Subdivision 8 provides: "A trooper who has completed six months of continuous employment shall not be suspended, demoted or discharged except for just cause." (Emphasis added). We agree with the district court, however, that Bogren could be terminated without cause because she had not completed her 12-month probationary period, a triggering event for subdivision 8's just cause provision and the attendant termination proceedings identified in § 299D.03.

We respectfully disagree with the district court's conclusion that Bogren only compared herself to nonprobationary troopers. On appeal, Bogren presents scant evidence that the patrol did not discipline several white male probationary officers when citizen complaints were lodged against the troopers or when disciplinary issues arose. The same probationary officers were also identified in Bogren's response to the state's memorandum in support of summary judgment.[5] The state argues, and we agree, however, that the

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Our conclusion is based on subdivision 7 of the same statute:

> Every person employed and designated as a state trooper under and pursuant to the provisions of this section, after 12 months of continuous employment, shall continue in service and hold the position without demotion, until suspended, demoted, or discharged in the manner hereinafter provided for one or more of the causes specified herein.

(Emphasis added). Bogren was "employed and designated" as a trooper on February 24, 1995. (Appellant's App. at 82). Because Bogren's termination occurred within a year after her designation as a trooper, we read subd. 7 to expressly provide that subd. 8 is inapplicable, and the patrol was therefore entitled to terminate Bogren without reason. Our reading of § 299D.03 is consistent with the state patrol's collective bargaining agreement (CBA). See CBA, Article 15 § 7, Appellees' App. at 120 ("Probationary employees shall not be subject to any arbitration provision of the Agreement nor shall the employee be subject to the provisions o. M.S.A. § 299D.03.). We accordingly reject Bogren's assertion that there is little difference between herself and the nonprobationary officers.

[5] Bogren identifies five alleged probationary troopers in her brief to whom she seeks to compare herself. The record evidence upon which Bogren relies does not establish that the five officers were probationary troopers. "[A] party opposing a motion for summary judgment may not rest upon the mere allegations or denials of the pleadings, but by affidavits or as otherwise provided in Rule 56 must set forth specific facts showing that there is a genuine issue for trial." Jaurequi v. Carter Mfg. Co., 173 F.3d 1076, 1085 (8th Cir. 1999) (quotation omitted). The state concedes, however, that three of the troopers were probationary. (See State's Br. at

probationary-trooper evidence offered by Bogren is insufficient to establish pretext. "To be probative evidence of pretext, the misconduct of more leniently disciplined employees must be of 'comparable seriousness.'" Harvey v. Anheuser-Busch, Inc., 38 F.3d 968, 972 (8th Cir. 1994) (quoting Lanear v. Safeway Grocery, 843 F.2d 298, 301 (8th Cir. 1988)). Bogren presents no evidence that any of the probationary officers ever received a comparable criminal citation nor that concerns over their accountability, driving performance or tendency to prevaricate were raised during their probationary period. Nor does she show that they were involved in motor vehicle accidents while on patrol. Rather, the record reflects only that two probationary troopers received a single citizen complaint, both of which were investigated and found to be unsustained, and a third received two citizen complaints. Moreover, Bogren has not shown that the supervisor or supervisors responsible for her termination were also involved in the disciplinary action, or lack thereof, of the white male probationary officers. See id. (recognizing that individuals are generally not similarly situated when different decision makers are involved in the respective disciplinary action).

Bogren advances other arguments in support of her burden. She argues there is evidence of "blatant lies and inaccuracies" in the supervisors' report recommending her termination. For the most part, the supervisors' report merely presents issues and concerns raised by other troopers during Bogren's probationary period, which are supported by the record, and summarizes the tea-cup incident at Johnson's home. We find no evidence supporting Bogren's assertion that the report contains blatant lies, included by her supervisors to justify her termination, nor any evidence

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19.) For that reason, we consider the state's treatment of those individuals in determining whether summary judgment is appropriate.

related to the report's preparation which would cause a fact finder to question the explanation offered by the state.

Bogren also contends the fact that she is the only black female trooper (and one of few black troopers) ever employed by the patrol is circumstantial proof of pretext. In essence, she advances simplistic demographic evidence of the patrol's workforce to meet her pretext burden. In Hutson v. McDonnell Douglas Corp., we recognized that statistical evidence "may support a finding of pretext, particularly where there are independent, direct grounds for disbelieving the employer's explanation for discharge." 63 F.3d 771, 778 (8th Cir. 1995) (internal quotations omitted); see also Kim v. Nash Finch Co., 123 F.3d 1046, 1059 (8th Cir. 1997) (in addition to other evidence that the proffered reason was false, pretext was established by evidence that out of 3,500 employees, only 2 management employees in 25 years were nonwhite). The evidence Bogren presents, however, is insufficient to establish a genuine issue of pretext for two reasons. First, there is no independent evidence to support a finding of pretext. Second, we conclude the generic type of employment statistics presented by Bogren are not probative of the reason for her termination. See Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1319 (10th Cir. 1999) ("[B]ecause overall employment statistics have little bearing on the specific intentions of the employer in making particular hiring decisions, such statistical evidence will rarely suffice to rebut an employer's legitimate, nondiscriminatory reasons for a particular adverse employment action."); LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 848 (1st Cir. 1993) ("[S]tatistical evidence in a disparate treatment case, in and of itself, rarely suffices to rebut an employer's legitimate, nondiscriminatory rationale for its decision to dismiss an individual employee."); cf. Hutson, 63 F.3d at 777 (statistical evidence is probative of pretext when it analyzes the treatment of comparable employees).

In sum, we conclude Bogren has not presented sufficient evidence from which a reasonable fact finder could disbelieve the state's nondiscriminatory explanation for her termination. Her evidence of pretext is wholly insufficient to create a genuine issue of material fact under Rule 56.

B. Hostile Work Environment

Bogren's Title VII hostile work environment theory is based primarily on alleged harassing comments made and conduct engaged in by academy instructors during Bogren's academy training. She also advances that she was subjected to a hostile work environment when her supervisors presumed she lied or was evasive during the investigation of the tea-cup incident and when they determined she was not accountable for her actions as a trooper. To establish a Title VII hostile work environment claim, Bogren must establish the following: "(1) she is a member of a protected group; (2) unwelcome harassment occurred; (3) a causal nexus existed between the harassment and her protected-group status; (4) the harassment affected a term, condition, or privilege of employment; and (5) her employer knew or should have known of the harassment and failed to take prompt and effective remedial action."[6] Austin v. Minnesota Mining & Mfg. Co., 193 F.3d 992, 994 (8th Cir. 1999). The district court determined that Bogren had not shown any evidence of conduct creating a hostile work environment. We agree.

Bogren's supervisors' conclusions that she was evasive and unaccountable do not, as a matter of law, rise to the level

[6] A plaintiff need not show that her employer failed to take remedial action with knowledge of the harassing conduct if the alleged harassers are supervisory employees. See Bradley v. Widnall, No. 00-1046, 2000 WL 1689711, at *3 & n.5 (8th Cir. Nov. 13, 2000). The element requires no further discussion in this case because Bogren failed to present evidence supporting the second element of her hostile work environment claim--that she was subjected to unlawful harassment.

of a hostile work environment. See Oncale v. Sundowner Offshore Servs., Inc., 523 U. S. 75, 81 (1998) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview." (quotation omitted)). As for the environment at the academy, Bogren identifies no instances in which she was subjected to racially or sexually harassing conduct or language, nor does she demonstrate that race or gender played any part in how she was treated by the instructors. When interviewed about the former cadets' complaints, Bogren made a general complaint about cadets being treated inappropriately but stated there were incidents involving both males and females. See Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269 (8th Cir. 1993) (stating the key issue in a hostile work environment claim "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." (quotation omitted)).

C. Retaliation

Bogren next claims she was unlawfully terminated from the patrol for complaining to the investigator about harassing and discriminatory conduct at the academy. To establish a prima facie case of Title VII retaliation, Bogren must show: (1) she engaged in activity protected by Title VII; (2) she suffered an adverse employment action; and (3) a causal connection between her protected activity and the adverse employment action. See Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir.) (en banc), cert. denied, 120 S. Ct. 59 (1999). The district court concluded Bogren's claim fails because she presents no evidence of the first element--that she engaged in activity protected by Title VII.

Title VII prohibits employers from retaliating against employees for engaging in two broad categories of protected

activity: 1) opposing any discrimination made unlawful by Title VII or 2) making a charge or participating in any manner in an investigation or proceeding under Title VII. See 42 U.S.C. § 2000e-3(a) (1994). Bogren alleges in her complaint that she opposed activity made unlawful by Title VII, but upon review of the record we find no evidence to support her claim. During the interview, as we previously noted, Bogren identified a limited number of instances in which instructors intimidated cadets, but she explained that the intimidation was directed at both male and female cadets--a complaint unprotected by Title VII. Moreover, as the district court noted, Bogren's answers to the interviewer's questions did not support the claims of harassment made by her fellow cadets. Because Bogren presents no evidence that she opposed discrimination made unlawful by Title VII, we conclude the court properly granted summary judgment on her retaliation claim.

III.

A. Equal Protection

We turn next to Bogren's claims against Lieutenants Fraser and Hodapp, and Captain Mengelkoch in their individual capacities. To begin, she brings a § 1983 claim against the three, asserting they violated her right to equal protection. In general, the Equal Protection Clause requires that state actors treat similarly situated people alike. See Klinger v. Department of Corrections, 31 F.3d 727, 731 (8th Cir. 1994), cert. denied, 513 U.S. 1185 (1995). State actors may, however, treat dissimilarly situated people dissimilarly without running afoul of the protections afforded by the clause. See id. Consequently, Bogren must as a threshold matter demonstrate that Fraser, Hodapp and Mengelkoch treated her less favorably than similarly-situated troopers on account of her membership in a protected class. See Keevan v. Smith, 100 F.3d 644, 647-48 (8th Cir. 1996). The district

court concluded that Bogren failed to show that similarly situated white and male probationary troopers were treated more favorably, and her equal protection claim fails for that reason. For the same reasons discussed in relation to Bogren's Title VII discriminatory discharge claim, see supra § II.A., we too agree that Bogren fails to present sufficient evidence that she was treated less favorably than other similarly situated troopers.

B. § 1981

Bogren also seeks to recover against the individual defendants pursuant to 42 U.S.C. § 1981 (1994). Section 1981, as amended by the Civil Rights Act of 1991, provides a cause of action for discrimination in the employment relationship. See 42 U.S.C. 1981(a), (b); see also Richmond v. Board of Regents of the Univ. of Minn., 957 F.2d 595, 597 (8th Cir. 1992) (recognizing that prior Supreme Court precedent to the contrary, see Patterson v. McLean Credit Union, 491 U.S. 164 (1989), was superceded by the 1991 amendments). As an initial matter, Fraser and Hodapp argue Bogren's § 1981 claim fails as a matter of law because she was an at-will employee. Whether an at-will employee may maintain a § 1981 claim is a matter of first impression in this circuit. For those circuits which have addressed the issue, the resounding view is that an at-will employee has a cause of action under § 1981 for discrimination occurring in the employment relationship. See, e.g., Lauture v. International Bus. Machs. Corp., 216 F.3d 258, 260 (2d Cir. 2000) ("We join the emerging consensus of the district courts in this circuit, and the other circuit courts of appeal that have squarely decided this issue, to hold that an at-will employee may sue under § 1981 for racially discriminatory termination."). But see Gonzalez v. Ingersol Milling Mach. Co., 133 F.3d 1025, 1035 (7th Cir. 1998) (questioning, in

dictum, whether an at-will employee has sufficient contractual rights to support a § 1981 claim).

We need not weigh in on the question, however, because even assuming Bogren may maintain a § 1981 claim despite her at-will status, her claim fails on other grounds. As the district court recognized, a plaintiff must demonstrate purposeful discrimination to support a § 1981 claim, see General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982), and thus, the McDonnell-Douglas burden-shifting framework is equally applicable on summary judgment to a § 1981 claim, see Roark, 189 F.3d at 761. Because Bogren cannot meet her burden of demonstrating a genuine issue of pretext, which would give rise first to an inference of, and then be of sufficient strength to support an actual finding of, purposeful discrimination, her § 1981 claim fails.

C. § 1985

Lastly, Bogren claims the individual defendants conspired in violation of 42 U.S.C. § 1985(3) (1994) to deprive her of her right to equal protection. To prove a constitutional conspiracy, a plaintiff must show that the defendants:

> (1) "conspir[ed] ..." (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." [She] must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

Andrews v. Fowler, 98 F.3d 1069, 1079 (8th Cir. 1996) (quoting Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971)). The showing requires a plaintiff to prove an agreement between the conspirators, which can be satisfied by "pointing to at least some facts which would suggest that appellees reached an understanding to violate her rights." Larson by Larson v. Miller, 76 F.3d 1446, 1454 (8th Cir. 1996) (brackets and quotation omitted). As the district court concluded, Bogren's claim fails because she has not shown sufficient facts to support a finding that Hodapp, Fraser or Mengelkoch agreed to violate her right to equal protection.

Bogren suggests a fact finder could infer an agreement between the individual defendants to violate her rights based on their hand in preparing the supervisors' report. She claims all three participated in its preparation and that the three included lies and inaccuracies in the report, or adopted the others' lies, to justify her release from the patrol. As we have already said, we do not believe the record supports the allegedly insidious nature of the supervisors' report that Bogren advances nor do we agree that a jury could infer an unlawful agreement merely because the three may have assisted in the report's preparation. Although the point of the report was to justify Bogren's termination, there is no evidence that the three superiors were motivated by Bogren's race or her gender in documenting the events included in the report or in recommending her termination. The record simply does not justify any inference that an agreement was made between the three to deprive Bogren of her right to equal protection.

IV.

For the foregoing reasons, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Ann Bogren, Civil File No. 98-880 (PAM/JGL)

Plaintiff,

v. **MEMORANDUM AND ORDER**

The State of Minnesota; Department of Public Safety; Donald Davis, Commissioner of the Department of Public Safety, in his official capacity; Minnesota State Patrol; Ann Beers, Chief of the State Patrol, in her official capacity; Lieutenant Thomas Fraser of the State Patrol, personally and individually; Lieutenant Lori Hodapp of the State Patrol, personally and individually; and Lieutenant Colonel Stephen Mengelkoch of the State Patrol, personally and individually,

Defendants.

This matter is before the Court upon Defendants' Motions for Summary Judgment. For the following reasons, the Court grants Defendants' motions.

BACKGROUND

Plaintiff Ann Bogren is a former probationary trooper with the Minnesota State Patrol. Bogren, a black female, was accepted into the State Patrol Training Academy (the "Academy") in November 1994. On November 14, 1995, Bogren was terminated from the Patrol. She then filed the present lawsuit, alleging race and gender discrimination.

In February 1995, in response to complaints of gender harassment by two other cadets at the Academy, Bogren was interviewed. During this interview, Bogren stated that while there were incidents at the Academy which she found inappropriate, she did not believe they were directed solely at females. (See Miller Aff. Ex. 52.) She also stated that she did feel she was treated differently than other cadets in some situations. For example, Bogren remembers being teased because she went on a ride-along with someone from the Burnsville Police Department. (See id.) Bogren also admitted that the instructors often made sexual comments, yet she noted that none were ever made directly towards her. (See id.) In the entire interview, Bogren never recounted any way in which she personally was treated differently because of her race or sex.

In February 1995, Bogren graduated twenty-third out of twenty-seven in her class from the Academy. She was subsequently sworn in as a State Trooper and began her mandated one-year probationary period.[1] For a time, Bogren

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[1] The controlling collective bargaining agreement requires that all new troopers serve a probationary period of 12 months. (See Cunningham Aff. Ex. K at 15.) Bogren asserts that Minnesota Statute § 299D.03, subdivision 8, affords her protection. Subdivision 8 provides, in pertinent part:

> Just Causes for Discharge. A trooper who has completed six months of continuous employment shall not be suspended, demoted or discharged except for just cause.

Minn. Stat. § 299D.03, subd. 8. However, the previous subdivision states:

> Every person employed and designated as a state trooper under and pursuant to the provisions of this section, after 12 months of continuous employment, shall continue in service and hold the position without demotion, until suspended, demoted, or discharged in the manner hereinafter provided for one or more of the causes specified herein.

Id., subd. 7. Bogren was designated a trooper on February 24, 1995. Thus, under subdivision 7, she was required to serve a twelve-month probationary period. Thereafter, if she became a certified trooper, she could avail herself of the benefits of subdivision 8, which only applies to a "trooper," and not to a "designated trooper." These two subdivisions

received additional field training. Eventually she started on solo patrol. During her probationary period, Bogren's performance was routinely monitored. Although Bogren's evaluations were quite positive at the beginning of her probationary period, towards the end, she received much more criticism. Her field training officer, Brian Polansky, documented several traffic violations by Bogren. Bogren admits that tension had developed between Polansky and her, and notes that Polansky made a comment which she interpreted as racist. Polansky was not involved in the decision to terminate Bogren.

During Bogren's probationary period, Defendants assert that several of the State Patrol supervisors had concerns about Bogren's performance. First, the supervisors observed that Bogren had difficulty paying attention to traffic signals and operating the car while, at the same time, monitoring the radio and performing her job. Additionally, Defendants note that Bogren did not work well with Polansky, her field training officer. Polansky felt that Bogren reacted with resistance when he evaluated her performance after each traffic stop. Finally, there is some evidence that Bogren tried to cover up a traffic accident she was involved in. After Bogren hit a metering ramp light, another trooper had to convince her to file a report, as required by the department's policies. Ultimately, Bogren did file the report on the day of the accident.

On October 22, 1995, while she was not on duty, Bogren went to the home of Steve Johnson, her boyfriend. Bogren contends that the reason for this visit was to end her relationship with Johnson and request that Johnson return her keys. While at Johnson's house, Bogren and Johnson began

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cannot be interpreted in a manner inconsistent with one another. Bogren's interpretation of the statute would render subdivision 7 mere surplusage. Thus, the Court finds that subdivision 7 comports with the collective bargaining agreement, which requires that all troopers serve a twelve-month probationary period.

arguing. As Bogren was leaving, she dropped some oriental teacups which she had previously given to Johnson as a gift. Johnson asserts that Bogren deliberately threw the teacups on the ground, while Bogren contends that she accidentally dropped the teacups when Johnson's dog jumped up on her.

Johnson reported the incident to the Columbia Heights Police Department, as well as to the State Patrol. A police officer went to Johnson's house and took his complaint, and eventually charged Bogren with criminal damage to property.[2] The officer also telephoned Bogren, but the two only spoke for a brief time. The officer then called Lieutenant Thomas Fraser at the State Patrol and informed him of the incident. The next morning, Fraser called Lieutenant Colonel Stephen Mengelkoch, to report the complaint. According to procedure, Mengelkoch sent the complaint to the Internal Affairs division; that division eventually sent the complaint back to Mengelkoch, who then assigned Fraser to investigate.

As a part of the investigation, Fraser took taped statements from Johnson and Monica Hallman, a woman who was at Johnson's house at the time of the incident. Additionally, Fraser met with Bogren and her attorney and took a taped statement. During this interview, Fraser asked Bogren whether she had ever received counseling for anger management. Initially, Bogren repeatedly stated that she had not, and that she did not know a psychologist who specialized in anger management. Eventually, after Bogren met with her attorney, Fraser rephrased the question as whether Bogren had ever seen "a counselor at any time who specialized in anger or some how deals with it." (K. Peterson Aff. Ex. G at 10-12.) Bogren then admitted that she had spoken with a counselor before she joined the Academy because she believed she would need to learn effective ways of dealing

[2] Ultimately, on November 15, 1995, Bogren pleaded guilty to a reduced charge of petty misdemeanor criminal damage to properly.

with anger if she was going to be a State Trooper. (See id. at 12.) Based on this exchange, Fraser determined that Bogren was untruthful and evasive during the investigation. This evasiveness, along with the incident involving Johnson, prompted Fraser to recommended to Mengelkoch that Bogren be terminated.

Mengelkoch then asked Lieutenant Lori Hodapp to write a supervisor's report which would document the reasons for Bogren's termination. Although Hodapp does not remember writing the report, she recognizes it as in her handwriting. In writing the report, Hodapp was to summarize the information contained in Bogren's personnel file. The supervisor's report lists the incident between Bogren and Johnson as one of the reasons for her termination. The report also notes that several supervisors and coworkers heard Bogren make comments which tend to show a negative and angry attitude. However, Fraser, Mengelkoch and Hodapp were unable to identify which individuals heard these comments. The report recommended that Bogren be terminated, and Bogren was notified of this decision on November 8, 1995. Bogren was ultimately terminated on November 14, 1995.

Following her termination, Bogren filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). On December 15, 1997, the EEOC issued Bogren a right to sue letter. Bogren then filed the present lawsuit. In Count One of her Complaint, Bogren alleges a Title VII claim of sex and race discrimination by the state. Count Two contains a similar claim for retaliation. Counts Five through Seven allege violations of 42 U.S.C. §§ 1983, 1985, and 1981 by Defendants Fraser, Hodapp and Mengelkoch. Finally, Count Nine alleges that all defendants were negligent in their actions toward Bogren.[3] Defendants

[3] Counts Three and Four, containing claims under the Minnesota Human Rights Act, were previously dismissed by Stipulation and Order. (See Clerk Doc. No. 37.) Additionally, in a previous Order, this Court dismissed Count Eight with prejudice. (See Clerk Doc. No. 60.)

now move for summary judgment on all of Bogren's remaining claims.

DISCUSSION

A. Standard of Review

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Unigroup, Inc. v. O'Rourke Storage & Transfer Co., 980 F.2d 1217, 1219-20 (8th Cir. 1992). The Court determines materiality from the substantive law governing the claim. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Disputes over facts that might affect the outcome of the lawsuit according to applicable substantive law are material. See id. A material fact dispute is "genuine" if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party. See id. at 248-49.

B. Title VII Discrimination

1. Discriminatory Discharge

Bogren makes Title VII claims for race and gender discrimination under the theories of discriminatory discharge and hostile work environment. The discriminatory discharge claim is analyzed under the familiar burden-shifting framework of McDonnell Douglas v. Green, 411 U.S. 792 (1973). Under McDonnell Douglas, once Plaintiff establishes a prima facie case of discrimination, the burden shifts to Defendants "to articulate some legitimate, nondiscriminatory

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Defendants Donald Davis and Ann Beers were also dismissed from the case. (See id.)

reason for the employee's rejection." Id. at 802. If Defendants meet this burden, the burden then shifts back to Plaintiff to show that the reasons offered are pretextual. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

To establish a prima facie case of discriminatory discharge, Bogren must show that she is a member of a protected class, that she was performing her job satisfactorily, and she was discharged. See Rose-Maston v. NME Hospitals, Inc., 133 F.3d 1104, 1107 (8th Cir. 1998). As a female and an African-American, Bogren is a member of two protected classes. See Carter v. Chrysler Corp., 173 F.3d 693, 700 (8th Cir. 1999). Defendants contend that Bogren has not met the elements of the prima facie case because she was not performing her job satisfactorily. However, because the more onerous burden is that of showing pretext, the Court will assume, arguendo, that the prima facie case is established.

Defendants put forth several nondiscriminatory reasons for terminating Bogren from her position with the Highway Patrol. Defendants point out that Bogren was a probationary employee, her supervisors had documented her driving problems, she received a criminal citation, and she was evasive during the Internal Affairs investigation. Although Bogren disputes these reasons, her disagreement amounts to nothing more than an assertion that the reasons are pretextual. In St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509 (1993), the Supreme Court held that "the determination that a defendant has met its burden of production . . . can involve no credibility assessment." Thus, the Court reasoned that by producing evidence of a nondiscriminatory reason for the action taken, the defendant met its burden of production. See id. Here, Defendants have proffered several reasons for Bogren's termination. Any one of them suffices to meet their burden of production.

To withstand a motion for summary judgment, Bogren must show that all of the reasons Defendants proffered for her

termination are pretextual. Here, the Court fords that Bogren has failed to demonstrate pretext with respect to Defendants' assertion that, given her probationary status, they terminated Bogren for engaging in conduct unbecoming an officer. In trying to establish pretext, Bogren makes comparisons to several other white male troopers who were charged with crimes. See Lynn v. Deaconess Med. Ctr., 160 F.3d 484, 488 (8th Cir. 1998) (holding that the plaintiff must "establish that he or she was treated differently than other employees whose violations were of 'comparable seriousness.'"). However, Bogren failed to identify any troopers who were, in fact, comparable to her, and yet received different treatment. Lynn places the burden on the plaintiff to show that she is comparable to other non-protected employees. See id. at 487.

The only white male probationary trooper to whom Bogren compares herself is Eric Hutchins. Bogren asserts that the circumstances surrounding Hutchins's termination call into question the integrity of Defendants' organization. Hutchins was a probationary trooper who was fired, Bogren argues, because he had applied for a position with the Department of Natural Resources. Hutchin's affidavit and its supporting exhibits indicate that Hutchins was performing satisfactorily up until that time. (See Miller Supp. Aff. Exs. 65-66.) This evidence is intended to imply that Defendants manufactured reasons to terminate Hutchins. Apparently, Bogren would like this court to conclude that, if Defendants were dishonest when they terminated Hutchins, they likely were dishonest when they terminated Bogren.

The Court finds that the Hutchins evidence does not support Bogren's claims of discrimination. The events surrounding Hutchins's termination tend to show, at most, a bad and potentially unfair employment decision. The oft-used quote is applicable here: "Federal courts do not sit as a super-personnel department that reexamines an entity's business decisions . . . . Rather, our inquiry is limited to whether the employer gave an honest explanation of its

behavior." Harvey v. Anheuser-Busch, Inc., 38 F.3d 968, 973 (8th Cir. 1994). More importantly, the fact that Defendants terminated Hutchins, a white male probationary trooper, using what Bogren alleges are discriminatory actions, weakens, rather than supports, Bogren's case. If Defendants used the same unfair tactics regarding both Hutchins and Bogren, then racial or gender discrimination could not have been the impetus behind the actions.

In every other incident pointed out by Bogren to show she was singled out for discriminatory treatment, the male trooper involved was beyond his probationary period. Consequently, those troopers were covered by the union's collective bargaining agreement and had the benefit of the union grievance procedures. Thus, regardless of whether the male troopers were accused of more serious crimes, the response by Defendants would likely be different merely because of the existence of the union contract. As Bogren was not the beneficiary of any of these procedures, Defendants had ample leeway to make a proactive decision to terminate Bogren for her conduct before another similar incident occurred. For these reasons, the Court finds that Bogren did not show that her termination for conduct unbecoming an officer was a pretext for discrimination. Therefore, her discriminatory discharge claim fails.

2. Hostile Work Environment

Bogren's claim that she was subjected to a hostile work environment requires that Bogren establish the following: that she belongs to a protected group; that she was subjected to unwelcome racial or sexual harassment; that this harassment affected a term, condition, or privilege of her employment with the Highway Patrol; and that Defendants knew or should have known of the harassment but failed to take action. See Carter, 173 F.3d at 700. Bogren asserts that she was subjected to a hostile work environment when "the defendants

assumed she was lying, both in the investigation and in the incident in which Zeler reported that the plaintiff was unwilling to file an accident report." (Pl.'s Mem. Opp'n State Defs. at 28-29.) Additionally, Bogren contends that the vulgar and sexual language at the Academy, along with the physically invasive conduct occurring at the Academy, constituted a hostile work environment. (See id. at 29.)

In order for harassment to be actionable under a hostile work environment theory, the harassment must be so severe or pervasive that it alters the conditions of the victim's employment, thus creating an abusive working environment. See Kline v. City of Kansas City, 175 F.3d 660, 669 (8th Cir. 1999) (citing Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). Further, Bogren must point out "[m]ore than a few isolated incidents of harassment." Gilbert v. City of Little Rock, 722 F.2d 1390, 1394 (8th Cir. 1983). First, Defendants' "assumption" that Bogren was lying during the investigation does not necessarily constitute gender or racial harassment. As Defendants' counsel aptly pointed out at oral argument, a person's subjective belief does not constitute conduct which could be viewed as harassment. Additionally, regardless of whether Bogren was actually less than truthful in her interview with Fraser, the Court finds that Bogren has provided no evidence to support her assertion that Fraser's conclusion was based on her race or gender. Moreover, a review of the transcript of Bogren's interview indicates that Bogren was arguably being evasive when Fraser questioned her about the counselor she had seen. Therefore, Defendants' conclusions about Bogren's truthfulness were viable and unrelated to her protected class status.

Second, Bogren's allegations of harassment at the Academy do not support a hostile work environment theory. Bogren asserted that one of the training officers "regularly used sexually offensive language and made comments in a sexually offensive manner." (Pl.'s Mem. Opp'n State Defs. at

2.) However, Bogren never asserts that any of these comments were directed towards her. Moreover, Bogren never complained to anyone about the conduct at the Academy. Even more telling is that fact that, when given a clear opportunity to voice any concerns about harassment, Bogren remained quiet.

When Bogren was questioned by Thelma James, Bogren concluded that she did not think females were treated more harshly than males. (See Miller Aff. Ex. 62.) In fact, Bogren admitted that "there were incidents . . . involving both males and females that I didn't think appropriate." (Id.) Bogren also stated that she felt accepted by male cadets in the Academy. (See id.) Additionally, when asked about the sexual comments made by training officers, Bogren noted that "they were never said to me." (Id.) The final question posed to Bogren asked if there were anything additional she would like to add to her comments. Bogren did not make any additional complaint about any alleged sexual harassment. Thus, although Bogren's responses may have indicated that an intimidating environment existed at the Academy, nowhere does she intimate that any taunting she personally received, such as after she went on a ride-along with the police department, was based on her gender.

In summary, none of the evidence Bogren offers suggests a hostile work environment, either at the Academy or one the job following her training. Even if one were to concede that Bogren identified some incidents of harassment, these incidents are isolated. More importantly, few, if any, of the alleged incidents were directed towards Bogren personally. Accordingly, summary judgment on Bogren's hostile work environment claim is granted.

3. Retaliation

Bogren asserts that Defendants retaliated against her because she opposed practices which violated Title VII. The

elements of a retaliation claim include (1) the plaintiff demonstrating that she engaged in protected activity; (2) evidence of an adverse employment action occurring after the protected activity; and (3) a causal connection between the two. See Sweeney v. City of Ladue, 25 F.3d 702, 703 (8th Cir. 1994). Here, Bogren's claim fails on the first element.

Title VII defines a "protected activity" as activity in opposition to prohibited employment practices or the filing of a charge or any participation in an investigation or hearing covered by Title VII. See 42 U.S.C. § 2000e-3(a). Bogren's Complaint states that Bogren "opposed practices made unlawful by Title VII." (Comp. ¶ 15.) However, Bogren has no evidence to support this assertion. In fact, as the Court has already discussed, Bogren never made any complaints about racial or gender harassment when she had the opportunity to do so. None of the comments which Bogren made regarding offensive conduct were race or gender-related. Moreover, any comments Bogren may have made when interviewed in February 1995 were unrelated to tile reasons Bogren was terminated. In fact, eight months had passed between this interview and Bogren's ultimate termination. Moreover, a careful review of Bogren's answers to the questions posed reveals that Bogren did not even support; the harassment complaint made by her fellow cadets. Thus, there would be no reason for Defendants to retaliate against Bogren. In short, Bogren never engaged in any protected activity prior to her termination. Accordingly, Bogren has failed to make out a prima facie case of retaliation.

C. Equal Protection - § 1983 Claim

Bogren makes her equal protection claim against Defendants Fraser, Hodapp and Mengelkoch under 42 U.S.C. § 1983. Section 1983 allows redress when a state officer deprives a person of aright secured under the Constitution. An equal protection claim requires that Bogren show that she

was treated differently than other similarly situated persons simply because she belongs to a protected class. See Keevan v. Smith, 100 F.3d 644, 647-48 (8th Cir. 1996). Consequently, unless Bogren shows that "'she is similarly situated to those who allegedly received favorable treatment, [she] does not have a viable equal protection claim.'" Id. (quoting Klinger v. Department of Corrections, 31 F.3d 727, 731 (8th Cir. 1994)). This Court has already determined that Bogren failed to compare herself to any similarly situated trooper who received more favorable treatment than herself. As Defendants correctly point out, Bogren "fails to offer evidence of any white probationary trooper charged with a crime and allowed to remain in the State Patrol." (Defs.' Mem. Supp. at 17.) The only similarly situated male to whom Bogren compares herself received the same treatment as Bogren: termination. Bogren never shows that she was treated differently than other similarly situated males. Aside from Hutchins, Bogren's probationary status renders her differently situated than all others to whom she compares herself. Accordingly, her § 1983 claim fails.

D. Conspiracy - § 1985 Claim

To recover under 42 U.S.C. § 1985, Bogren must establish that Defendants conspired to deprive her of equal protection of the law, and that they committed an act in furtherance of the conspiracy resulting in an injury. See United Brotherhood of Carpenters & Joiners of Amer. v. Scott, 463 U.S. 825, 829-30 (1983). As an initial matter, the Court notes that it has already determined that Bogren cannot establish that she was treated differently than other similarly situated employees. It is self-evident that the lack of an equal protection violation precludes the finding of a conspiracy to deprive one of equal protection, as the injury element would not be satisfied. Additionally, Bogren fails to support her allegation of a conspiracy among Defendants. Evidence of a

conspiracy requires showing an agreement among two or more persons to inflict a wrong upon another, and an overt act resulting in damage. See Gometz v. Culwell, 850 F.2d 461, 464 (8th Cir. 1988) (citing Mizokami Bros., Inc. v. Mobay Chemical Corp., 660 F.2d 712, 718 n.8 (8th Cir.1981)). Aside from her failure to show an injury resulting from the alleged conspiracy, Bogren offers no evidence that any agreement existed among Defendants Fraser, Hodapp and Mengelkoch. Bogren does nothing more than allege that these three Defendants "falsified and misrepresented facts concerning Bogren's conduct and character." (Compl. ¶ 10.) Bogren presents no evidence of a meeting of the minds among Defendants. This omission, along with the fact that Bogren has no viable substantive equal protection claim, mandates that summary judgment be granted for Defendants on the conspiracy claim.

E. Interference with Contract - § 1981 Claim

In support of her § 1981 claim, Bogren alleges that Defendants Fraser, Hodapp and Mengelkoch interfered with her employment contract. (See Compl. ¶ 20.) Among other things, section 1981 protects individuals from racial discrimination in the making and enforcing of contracts. 42 U.S.C. § 1981(a). The phrase "make and enforce contracts" is defined to include "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Id. § 1981(b). To recover damages under section 1981, a plaintiff must establish that: (1) the plaintiff is a member of a racial minority; (2) defendant intended to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute, e.g., to make and enforce contracts. See Thomas v. St. Luke's Health Sys., Inc., 869 F. Supp. 1413, 1432 (N.D. Iowa 1994). As with claims under Title VII, section 1981

requires proof of intentional discrimination. See id. In essence, the elements of a section 1981 claim in the employment setting are the same as those of disparate-treatment, race-discrimination claims under Title VII. See id. Therefore, Bogren's allegations of a § 1981 violation are also subject to the McDonnell Douglas burden-shifting scheme. See id.; Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir. 1992). This court has already held that Bogren failed to show pretext, as required by McDonnell Douglas. Therefore, Bogren's § 1981 claim fails.

F. Negligence

Bogren also alleges a negligence claim under state law. 28 U.S.C. § 1367 allows federal courts to assert supplemental jurisdiction over state claims when a federal claim is properly before the court. However, when all federal claims have been dismissed, the court has discretion to dismiss the state claims as well. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988); Willman v. Heartland Hosp. E., 34 F.3d 605, 613 (8th Cir. 1994). In the present case, all of Bogren's federal claims have been dismissed via summary judgment. Because no federal claims against Defendants remain before the Court, the Court declines to assert supplemental jurisdiction over the remaining state claim for negligence. Consequently, the Court dismisses this claim without prejudice.

CONCLUSION

Bogren has failed to meet her burden of showing that the reasons which Defendants advance for her termination were mere pretext for either race or sex discrimination. Moreover, Bogren's hostile work environment claim fails both on the basis that the evidence does not establish pervasive conduct resulting in a hostile environment and that Bogren never made any complaints about the alleged abusive environment.

As for Bogren's equal protection claim under § 1983, Bogren did not provide any evidence of any similarly situated persons who were treated differently. The failure of this claim necessarily means that Bogren's conspiracy claim under § 1985 also fails. Additionally, the Court determines that Bogren's allegations under her § 1981 claim fail the McDonnell Douglas burden-shifting test. Finally, the Court declines to assert supplemental jurisdiction over Bogren's state negligence claim. For these reasons, Defendants' motions for summary judgment must be granted.

Accordingly, **IT IS HEREBY ORDERED** THAT:

1. Defendant's Motions for Summary Judgment (Clerk Doc. Nos. 74, 78, 88) are GRANTED;

2. Counts 1-2, and 5-7 of Plaintiff's Complaint (Clerk Doc. No. 1) are DISMISSED WITH PREJUDICE;

3. Count 9 of Plaintiff's Complaint (Clerk Doc. No. 1) is DISMISSED WITHOUT PREJUDICE; and

4. Plaintiff's Complaint (Clerk Doc. No. 1) is DISMISSED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 12, 1999

s/
Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CIVIL NOTICE

DATE MAILED TO COUNSEL/PRO SE PARTIES: AUG 13, 1999

The purpose of this notice is to summarize the time limits for filing with the District Court Clerk's Office a Notice of Appeal to the Eighth Circuit Court of Appeals from a final decision of the District Court in a civil case.

This is a summary only. For specific information on the time limits for filing a Notice of Appeal, review the applicable federal civil and appellate procedure rules and statutes.

Rule 4(a) of the Federal Rules of Appellate Procedure (Fed. R. App. P.) requires that a Notice of Appeal be filed within:

1. Thirty days (60 days if the United States is a party) after the date of "entry of the judgment or order appealed from;" or

2. Thirty days (60 days if the United States is a party) after the date of entry of an order denying a timely motion for a new trial under Fed. R. Civ. P. 59; or

3. Thirty days (60 days if the United States is a party) after the date of entry of an order granting or denying a timely motion for judgment under Fed. R. Civ. P. 50(b), to amend or make Additional findings of fact under Fed. R. Civ. P.

52(b), and/or to alter or amend the judgment under Fed. R. Civ. P. 59; or

4. Fourteen days after the date on which a previously timely Notice of Appeal was filed.

If a Notice of Appeal is not timely filed, a party in a civil case can move the District Court pursuant to Fed. R. App. P. 4(a)(5) to extend the time for filing a Notice of Appeal. This motion must be flied no later than 30 days after the period for filing a Notice of Appeal expires. If the motion is filed after the period for filing a Notice of Appeal expires, the party bringing the motion must give the opposing parties notice of it. The District Court may grant the motion, but only if excusable neglect or good cause is shown for failing to file a timely Notice of Appeal.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Minneapolis Area Office
330 Second Avenue South, Suite 430
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Charge Number: 265960506
FEPA Number: ER19960530

Ann M. Bogren
2818 Taylor Street NE.
Minneapolis, MN 55418 Charging Party

vs.

Minnesota Department of Public Safety
444 Cedar Street, Suite 100-G
St. Paul, MN 55101-2156 Respondent

DETERMINATION

Under the authority vested in me by the commission, I issue the following determination as to the merits of the subject charge.

All requirements for coverage have been met. The Charging Party alleged that she was discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, and retaliated against in violation of Section 704 (a) of Title VII of the Civil Rights Act of 1964, as amended, in that she was treated differently and discharged because of her race/Black, gender/female, and because she opposed discriminatory practices.

Examination of the evidence indicates that a violation of the statue has occurred because the Respondent inequitably applied rules relating to general working conditions and employment privileges to the Charging Party, Ann M. Bogren, which led to her discharge. The evidence is sufficient to show that the Charging Party, a Black female, employed by Respondent from November 1994 until November 14, 1995, was treated differently and discharged. Evidence establishes that the Charging Party has been subjected to terms and conditions of employment different than those required of her co-workers which created an intimidating, hostile, and offensive environment that led to her discharge.

Based upon the Commission's investigation, the Commission is unable to conclude that the information obtained establishes a violation of Section 704 (a) of Title VII of the Civil Rights Act of 1964, as amended [Section 704(a)]. This does not certify that the Respondent is in compliance with Section 704(a). No finding is made as to any other issues that might be construed as having been raised by this charge.

This determination does not conclude the processing of this charge. The Commission will begin conciliation efforts to resolve all matters where there is reason to believe that violations have occurred.

On behalf of the Commission,

July 24, 1997
Date

s/
Michael J. Bloyer
Area Director

cc: Kristin Jones Pierre, Assistant Attorney General
Solicitor General Section
445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2128

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 99-3516

Ann Bogren,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and for Rehearing
	*	En Banc
State of Minnesota, et al.,	*	
	*	
Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.
(5128-010199)

February 15, 2001

Order Entered at the Direction of the Court:

s/ Michael E. Gans

Clerk, U.S. Court of Appeals , Eighth Circuit

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*** CURRENT THROUGH P.L. 107-7, APPROVED 4/12/01 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
GENERALLY

42 USCS § 1981 (2001)

§ 1981. Equal rights under the law

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

HISTORY:
(R. S. § 1977; Nov. 21, 1991, P.L. 102-166, Title I, § 101 105 Stat. 1071.)

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*** CURRENT THROUGH P.L. 107-7, APPROVED 4/12/01 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
GENERALLY

42 USCS § 1983 (2001)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

HISTORY:
(R. S. § 1979; Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284.)

(As amended Oct. 19, 1996, P.L. 104-317, Title III, § 309(c), 110 Stat. 3853.)

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*** CURRENT THROUGH P.L. 107-7, APPROVED 4/12/01 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
GENERALLY

42 USCS § 1985 (2001)

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully,

and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a

citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

HISTORY:
(R. S. § 1980.)

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*** CURRENT THROUGH P.L. 107-7, APPROVED 4/12/01 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
EQUAL EMPLOYMENT OPPORTUNITIES

42 USCS § 2000e (2001)

§ 2000e. Definitions

For the purposes of this title [42 USCS §§ 2000e et seq.]--

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, United States Code, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in

section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [26 USCS § 501(c)] except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [enacted March 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members

of such other labor organization) is (A) twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [enacted March 24, 1972], or (B) fifteen or more thereafter, and such labor organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) has the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees

subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 USCS §§ 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 USCS §§ 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of

pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title [42 USCS § 2000e-2(h)] shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 717.

HISTORY:
(July 2, 1964, P.L. 88-352, Title VII, § 701, 78 Stat. 253; Sept. 6, 1966, P.L. 89-554, § 8, 80 Stat. 662; March 24, 1972, P.L. 92-261, § 2, 86 Stat. 103; Oct. 31, 1978, P.L. 95-555, § 1, 92 Stat. 2076; Nov. 6, 1978, P.L. 95-598, Title III, § 330, 92 Stat. 2679; Nov. 21, 1991, P.L. 102-166, Title I, §§ 104, 109(a), 105 Stat. 1074, 1077.)

UNITED STATES CODE SERVICE
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*** CURRENT THROUGH P.L. 107-7, APPROVED 4/12/01 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
EQUAL EMPLOYMENT OPPORTUNITIES

42 USCS § 2000e-2 (2001)

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer--
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion,

sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices. It shall be an unlawful employment practice for a labor organization--
(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religions. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor

organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations. As used in this title [42 USCS §§ 2000e et seq.], the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an

unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if--

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title [42 USCS §§ 2000e et

seq.] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Businesses or enterprises extending preferential treatment to Indians. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance. Nothing contained in this title [42 USCS §§ 2000e et seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USCS §§ 2000e et seq.] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases.
(1) (A) An unlawful employment practice based on disparate impact is established under this title only if--
(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.
(B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.
(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.
(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".
(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.
(3) Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], a rule barring the employment of an individual who currently and knowingly uses or possesses a

controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores. It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [42 USCS §§ 2000e et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders.
(1) (A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal

civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had--

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to--

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.

HISTORY:

(July 2, 1964, P.L. 88-352, Title VII, § 703, 78 Stat. 255; March 24, 1972, P.L. 92-261, § 8(a), (b), 86 Stat. 109; Nov. 21, 1991, P.L. 102-166, Title I, §§ 105, 106, 107(a), 108, 105 Stat. 1074-1076.)

MINNESOTA STATE PATROL
FTO Biweekly Summary

Date: 3-20-95

Probationary Trooper: Ann Bogren

Field Training Officer: Brian Polansky

Completion of Step # 1 evaluation and recommendations.

The Probationary Trooper is:

✓ Progressing Satisfactorily
✓ Advance to next step

_____ Experiencing Difficulty
_____ Extend Training Period

STRENGTHS: Ann is very eager to learn and comprehends new material covered very quickly. She completes reports & citations that are clear and accurate

WEAKNESSES: Ann has committed a few minor traffic violations while operating the squad. She has some trouble with knowing & remembering where & what hwy she is on.

ADDITIONAL COMMENTS: Ann has a very nice personality and gets along well with other partners & myself. She is caring to others needs & friendly in her actions with motorists.

Brian Polansky
FTO

3-20-95
Date

G T Thomas Bopp
Supervisor

3-29-95
Date

MINNESOTA STATE PATROL
FTO Biweekly Summary

Date: 4-3-95

Probationary Trooper: BOGREN

Field Training Officer: MILLER

Completion of Step # 2 evaluation and recommendations.

The Probationary Trooper is:

X Progressing Satisfactorily
____ Advance to next step

____ Experiencing Difficulty
____ Extend Training Period

STRENGTHS:

TROOPER BOGREN IS VERY STRONG IN THE AREA OF OFFICER SAFETY, DWI ARREST AND PROCESS,AND REPORT WRITING.

WEAKNESSES:

TROOPER BOGREN IS PERFORMING AT SATISFACTORY LEVELS IN ALL CATAGORIES:

ADDITIONAL COMMENTS:

TROOPER BOGREN TAKES INSTRUCTION WELL AND HAS BEEN LEARNING FROM PREVIOUS MISTAKES. TROOPER BOGREN DEMONSTRATED A "TAKE CHARGE" ATTITUDE WHEN DEALING WITH INTOXICANTS AND DEMONSTRATES A TOLERENT ATTITUED THROUGHOUT THE DWI PROCESS. TROOPER BOGREN APPEARS TO GENUINELY ENJOY HER JOB.

FTO — Date 4-3-95

Supervisor — Date 4-5-95

MINNESOTA STATE PATROL
FTO Biweekly Summary

Date: 4/2/95

Probationary Trooper: Bogren 37

Field Training Officer: Weeberg 137

Completion of Step # 3 evaluation and recommendations.

The Probationary Trooper is:

✓ Progressing Satisfactorily
✓ Advance to next step

___ Experiencing Difficulty
___ Extend Training Period

STRENGTHS:

Trp Bogren was receptive to training & ideas that were different from others she had received. When she was instr. to do tasks differently, for safety of Troopers, or just ease, she would do the task as instructed.

She is willing to listen, and learn. She then attempts do the task as instructed.

WEAKNESSES:

Trp Bogren needs more work on Code 3, or high speed driving. She is not yet efficient or comfortable in area, but did make progress as this Step progressed

ADDITIONAL COMMENTS:

FTO — 4/16/95 Date

Supervisor — 4-24-95 Date

MINNESOTA STATE PATROL
FTO Biweekly Summary

Date: 5-4-95

Probationary Trooper: Ann Bagcraft

Field Training Officer: Brian Polansky

Completion of Step # IV evaluation and recommendations.

The Probationary Trooper is:

_____ Progressing Satisfactorily
_____ Advance to next step

✓ Experiencing Difficulty
_____ Extend Training Period

STRENGTHS: Ann has a good understanding of traffic laws. She completes reports and citations that are clear and concise. Ann is easy to get along with and gets along with her partners including the motoring public.

WEAKNESSES: Ann's driving has not been acceptable the past couple of weeks. She appears to be concentrating more on other things that are happening at the time. Radio traffic, MDT operation and observing traffic violations seem to distract her from her driving. When this occurs, she commits traffic violations that she is unaware of.

ADDITIONAL COMMENTS: Ann is well aware of the problems that she is having with her driving. We have discussed this area together several times. It noticed that she had some problems in step I such as going through red metering lights on an entrance ramp, speeding in residential area and going against traffic in the wrong

Brian Polansky
FTO

5-4-95
Date

(over →

Lt J Thom
Supervisor

5/10/95
Date

lane of traffic. Ann came back to me for step "III" after she was on the dog watch for four weeks. I noticed that her driving had not improved, in fact, I believe that she regressed. Ann was following other traffic at too close a distance at highway speeds. She would make a stop and be too close to the violator in that when the violator would stop, she would have to brake hard to stop in time. Ann would be so close to the violator's vehicle that you could not see the license plate. On more than one occasion, you could smell the brakes. When following too close, she was less than a second when using the two second rule.

On another incident where we had picked up a 10-51 10-49 female on a ramp while transporting her home, we nearly side swiped another motorist. Ann was driving & talking with the 10-49. Our lane ended & we were to merge left. Ann did, but never looked to see the motorist next to us slightly behind the driver's door. The other motorist had to brake hard & swerve to avoid an accident with us. He flashed his headlights at us and appeared to be unhappy as he passed us.

During week "10 we had the opportunity to work the 4550 station where Ann will work. She continued with driving through red metering ramp lights. She went through a stop sign. Ann would slow in speed & drift over the centerline while operating the MDT or answering the radio. She continued to follow others too close.

While talking to her about these violations, she appeared to get upset with me. She expressed that she may not have had the time needed to prepare her because of the four weeks on the dog watch. We had a meeting with Lt. Kutz about this also & together explain the difference in working the dog watch & rush hr traffic. Ann stated that she had little choice to use the MDT on the dog watch. It appears that she has trouble with concentrating on everything at this time and dividing her attention to all aspects while doing the job as a State Trooper while driving. She has stated and I agree with her that she is not aware of the violations & not deliberately doing so, while she is doing something else. Ann realizes that committing these violations does not look good in the public eye, nor is it good because we ticket others for the very same thing.

I don't know if extending the FTO program for driving is the answer at this point or not. I have noticed an improvement in the last few days with Ann concentrating more on her driving her location and radio traffic. This is a safety issue for herself, her

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MINNESOTA STATE PATROL

PROBATIONARY TROOPER MONTHLY EVALUATION REPORT

Probationary Trooper Anne Bogren # 317

District/Station 2500/4550

Period of Evaluation May 8, - June 7, 1995

CATEGORY		RATING (circle)				
1.	Personal Characteristics	1	2	(3)	4	5
2.	Physical Appearance and Conditioning	1	2	(3)	4	5
3.	Knowledge of Law Enforcement Practices and Procedures	1	2	(3)	4	5
4.	Knowledge of Departmental Policies and Procedures	1	2	(3)	4	5
5.	Technical Knowledge	1	2	(3)	4	5
6.	Motor Vehicle/Equipment Operation and Maintenance	1	(2)	3	4	5
7.	Communication and Interpersonal Skills	1	2	(3)	4	5

If a rating of 1 is assigned to any category, it must be validated with a written explanation. If a rating of 2 is assigned, a training plan for the Probationary Trooper shall be submitted with the monthly evaluation.

I acknowledge that I have been debriefed regarding my performance this date:

Anne Bogren — Probationary Trooper — 6-26-95 — Date

[signature] — Field Training Lieutenant — 6-26-95 — Date

TRAINING PLAN
Based on May 8, - June 7, 1995 Evaluation Period.
Probationary Trooper Evaluation Report.

Trooper Anne Bogren, SP 317

Only 1 category received a rating of 2. This category was Motor Vehicle/Equipment Operation and Maintenance. The reason a 2 was given was because some concern was expressed during the FTO program in regards to P/T Bogrens Patrol Unit operation, and P/T Bogren was involved in a very minor 10-50 her first month out.

I intend to ride with P/T Bogren, and all the other new P/Troopers. This will give me a chance to observe her driving firsthand, as well as give us a chance to discuss any driving situations as they occur.

Lt. A. Katz P852 6-25-95

MINNESOTA STATE PATROL

PROBATIONARY TROOPER MONTHLY EVALUATION REPORT

Probationary Trooper Ann Bogren # 317

District/Station 2500/4550

Period of Evaluation June 8, - July 7, 1995

CATEGORY		RATING (circle)				
1.	Personal Characteristics	1	2	(3)	4	5
2.	Physical Appearance and Conditioning	1	2	(3)	4	5
3.	Knowledge of Law Enforcement Practices and Procedures	1	2	(3)	4	5
4.	Knowledge of Departmental Policies and Procedures	1	2	(3)	4	5
5.	Technical Knowledge	1	2	(3)	4	5
6.	Motor Vehicle/Equipment Operation and Maintenance	1	(2)	3	4	5
7.	Communication and Interpersonal Skills	1	2	(3)	4	5

If a rating of 1 is assigned to any category, it must be validated with a written explanation. If a rating of 2 is assigned, a training plan for the Probationary Trooper shall be submitted with the monthly evaluation.

I acknowledge that I have been debriefed regarding my performance this date:

Ann Bogren — Probationary Trooper — 7-19-95 — Date

A. Kuf — Field Training Lieutenant — 7-19-95 — Date

TRAINING PLAN
Based on May 8, - June 7, 1995 Evaluation Period.
Probationary Trooper Evaluation Report.

Trooper Anne Bogren, SP 317

Only 1 category received a rating of 2. This category was Motor Vehicle/Equipment Operation and Maintenance. The reason a 2 was given was because some concern was expressed during the FTO program in regards to P/T Bogrens Patrol Unit operation, and P/T Bogren was involved in a very minor 10-50 her first month out.

I intend to ride with P/T Bogren, and all the other new P/Troopers. This will give me a chance to observe her driving firsthand, as well as give us a chance to discuss any driving situations as they occur.

H. A Kut P852 6-25-95

TRAINING PLAN
June 8, - July 7, 1995 Evaluation Period.
Probationary Trooper Evaluation Report.

Trooper Ann Bogren, SP317

On 6-26-95, myself and Trooper Bogren went over her evaluation report as well as her Training Plan for the same period. Unfortunately, we have not been able to start the ride-a-long sessions yet. Every effort will be taken to start them as soon as possible.

Given the aforementioned fact, there will be no change in the Training Plan until I first ride with Trooper Bogren. I do not want to change the current plan, or change her score in the Vehicle Operation category in either a positive or negative fashion, until I can observe her driving firsthand. This situation was discussed with Trooper Bogren on 7-17-95 and I received her understanding in this matter.

H. A Kut P852 7-18-95

MINNESOTA STATE PATROL

PROBATIONARY TROOPER MONTHLY EVALUATION REPORT

Probationary Trooper Ann Bogren # 317

District/Station 2500/4550

Period of Evaluation July 8, - August 7, 1995

CATEGORY		RATING (circle)				
1.	Personal Characteristics	1	2	3	(4)	5
2.	Physical Appearance and Conditioning	1	2	3	(4)	5
3.	Knowledge of Law Enforcement Practices and Procedures	1	2	(3)	4	5
4.	Knowledge of Departmental Policies and Procedures	1	2	(3)	4	5
5.	Technical Knowledge	1	2	(3)	4	5
6.	Motor Vehicle/Equipment Operation and Maintenance	1	2	(3)	4	5
7.	Communication and Interpersonal Skills	1	2	3	(4)	5

If a rating of 1 is assigned to any category, it must be validated with a written explanation. If a rating of 2 is assigned, a training plan for the Probationary Trooper shall be submitted with the monthly evaluation.

I acknowledge that I have been debriefed regarding my performance this date:

Ann Bogren — 08-21-95
Probationary Trooper — Date

A K Lt P852 — 8-21-95
Field Training Lieutenant — Date

MINNESOTA STATE PATROL

PROBATIONARY TROOPER MONTHLY EVALUATION REPORT

Probationary Trooper Ann Bogren #317

District/Station 2500/4550

Period of Evaluation August 8. - September 7, 1995

CATEGORY		RATING (circle)				
1.	Personal Characteristics	1	2	3	(4)	5
2.	Physical Appearance and Conditioning	1	2	3	(4)	5
3.	Knowledge of Law Enforcement Practices and Procedures	1	2	(3)	4	5
4.	Knowledge of Departmental Policies and Procedures	1	2	(3)	4	5
5.	Technical Knowledge	1	2	(3)	4	5
6.	Motor Vehicle/Equipment Operation and Maintenance	1	2	(3)	4	5
7.	Communication and Interpersonal Skills	1	2	3	(4)	5

If a rating of 1 is assigned to any category, it must be validated with a written explanation. If a rating of 2 is assigned, a training plan for the Probationary Trooper shall be submitted with the monthly evaluation.

I acknowledge that I have been debriefed regarding my performance this date:

Ann Bogren — 10-03-95
Probationary Trooper — Date

P852 — 9-19-95
Field Training Lieutenant — Date

MINNESOTA STATE PATROL

PROBATIONARY TROOPER MONTHLY EVALUATION REPORT

Probationary Trooper ANN BOGREN # 317

District/Station 2500/4550

Period of Evaluation September 8 - October 7

CATEGORY		RATING (circle)				
1.	Personal Characteristics	1	2	3	(4)	5
2.	Physical Appearance and Conditioning	1	2	3	(4)	5
3.	Knowledge of Law Enforcement Practices and Procedures	1	2	(3)	4	5
4.	Knowledge of Departmental Policies and Procedures	1	2	(3)	4	5
5.	Technical Knowledge	1	2	(3)	4	5
6.	Motor Vehicle/Equipment Operation and Maintenance	1	2	(3)	4	5
7.	Communication and Interpersonal Skills	1	2	3	(4)	5

If a rating of 1 is assigned to any category, it must be validated with a written explanation. If a rating of 2 is assigned, a training plan for the Probationary Trooper shall be submitted with the monthly evaluation.

I acknowledge that I have been debriefed regarding my performance this date:

Probationary Trooper — Date 11-8-94

Field Training Lieutenant — Date

NEWS RELEASE

MINNESOTA DEPARTMENT OF PUBLIC SAFETY
444 Cedar Street, Suite 100-E St. Paul, Minnesota 55101-2156
Fax 612-297-7313– TTY 612-282-6555

For Immediate Release
October 22, 1995

Contact: Kevin Burns
Office: (612) 296-8383
Pager: (612) 538-3133

STATE PATROL SUSPENDS TROOPER FOLLOWING ARREST

The Minnesota State Patrol has suspended Trooper 1 Bruce Brynell following his arrest Friday by the White Bear Lake Police Department.

Brynell, 30, was arrested and booked in Ramsey County on misdemeanor fifth degree domestic assault. He was not on duty at the time of the alleged incident. Brynell has been a member of the State Patrol since August, 1988

The State Patrol is cooperating fully with the White Bear Lake Police Department. In addition, the State Patrol has begun an internal affairs investigation into this matter. No additional details about this alleged incident are available from the Minnesota State Patrol.

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY

Internal Affairs Division

Statement

Date of Interview: Tuesday, November 7, 1995

Declarant: Mrs. Bruce Brynell
Interviewer: Captain Rod Lundgren

Mrs. B: Hello?

RL: Hi, Mrs. Brynell?

Mrs. B: Mm hmm.

RL: Hi, Capt. Lundgren calling.

Mrs. B: Hi.

RL: Do you have time to talk now?

Mrs. B: Yeah.

RL: OK. It won't take very long. I just have a few questions.

Mrs. B: Ah ha.

RL: Did you have anything before I ask you the questions?

Mrs. B: Well, I don't know anymore because...I guess I had talked to Mike - I'm not sure how to pronounce last name...

RL: Oh, the Chief?

Mrs. B: Chabries.

RL: Chabries, OK. Ah ha.

Mrs. B: The night this was on the news, you know, and I was very sickened that it made the news because I @@ him and I'll tell you that as far as I'm concerned this is a family matter.

RL: OK.

Mrs. B: And Bruce has always, always had a good record at work.

RL: Ah ha.

Mrs. B: And this to me shouldn't ...I mean I can see where you're coming from, however, it should not affect his job at all. It happened on his four days off and he's always had a record before.

RL: Mm hmm.

Mrs. B: Always.

RL: OK. And I know that you had talked to the Chief, he had made mention of it that you had called and it's not my place to say whether we do an investigation or not. It was the Chief's choice and...

Mrs. B: Well, he (inaudible) I think he said...well, no, I don't know if he said the same thing or not, but ...yeah, it's just been very disheartening that this became a work issue also.

RL: Mm hmm. I can understand how you're feeling and that's more or less what Bruce told me also when I talked to him that he didn't think it was a matter for the patrol, that he was off-duty and...

Mrs. B: However, I can see with his job where, you know, you might get involved in them in light of recent situations, I can see where you would get involved. But, I just hope that because of what's been in the news prior to this that no one is any harsher on him than they would be if nothing had been in the news.

RL: Oh. I see, what you're saying, right. And I would think that the Chief would take that into consideration.

Mrs. B: Mm hmm.

RL: Do you still want to answer some questions?

Mrs. B: I can.

RL: OK. If there's any question you don't want to answer, you can just tell me that. Was it late Friday night or early Saturday morning when this occurred?

Mrs. B: I believe it was late Friday night and apparently by the time I called the police it was probably five after twelve.

RL: OK, so it was you that called the police?

Mrs. B: Mm hmm.

RL: OK. And did you call them immediately after the incident, or did you wait for awhile?

Mrs: B: Actually I called...see, I'm afraid to even say anything because I don't want to get him in trouble. But I called my mother first, I don't know why, that was my first instinct. Then I went back...I was outside on the front step, then I went back in the house and then I decided I needed (inaudible), so then I called.

RL: OK.

Mrs. B: So it was probably right away - I was trying to figure out how not to call.

RL: Mm hmm. And can you tell me what part of your body came in contact with the glass when it broke?

Mrs. B: It's my upper back and shoulder, you know, because it's a wooden door and the top half this glass.

RL: I see, OK. Did you get injured at all?

Mrs. B: No. I had some bruises.

RL: OK, was that from hitting the glass or was that from when he grabbed you?

Mrs. B: That was actually, the way I looked at it, from being grabbed.

RL: I see, OK. How did he grab you, by your arms, or?

Mrs. B: Yeah.

RL: OK. And did he just push you backwards then? Or push you and let go or did he push you and follow through with the push?

Mrs. B: No, no. He (inaudible), you know, (inaudible) quit, but that time he held on, he didn't just push, it was a slam.

RL: OK. So it wasn't just a simple push, he kind of slammed you into it then?

Mrs. B: Right.

RL: And how far were you from the window when he did grab you and push you, was it quite a distance?

Mrs. B: I don't know exactly. I can't measure our...I think I was in the middle of the room and the room is rectangle. It wasn't real far.

RL: OK. Was it more than a couple of feet or...?

Mrs. B: Mm hmm.

RL: OK. Were there words exchanged between the two of you before he pushed you or did he just...?

Mrs. B: No, we were arguing.

RL: OK. Did you do anything physically to him prior to him pushing you?

Mrs. B: No.

RL: Was this the first time that he had done anything physical like this toward you?

Mrs. B: Mm hmm.

RL: Was that a yes?

Mrs. B: Yes.

RL: OK. Well I don't have anything else, Mrs. Brynell, is there anything that you think would be pertinent or significant to my investigation?

Mrs. B: Only what I've said before. And I really hope that it's taken into consideration.

RL: OK. I don't know what the Chief's thoughts are but I just can only think that he would ...would take everything into consideration on this.

Mrs. B: Well, I just want them to know that I really hope that they do.

RL: OK. I'll make sure...

Mrs. B: Looking at his past record, there is just no reason for him to go through anymore.

RL: OK. I'll make sure I pass that around too then.

Mrs. B: OK.

RL: OK?

Mrs. B: So is there anything you can tell me?

RL: There's not really anything I can tell you because the investigation is still open and so by law and by State Patrol policy, I can't really say much other than that Bruce has been, from what you're telling me, has been honest with me.

Mrs. B: Good. (Inaudible)

SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement is made and entered into this 28th day of November, 1995, by and between Bruce G. Brynell, Badge No. 520, ("Employee"), the Minnesota State Patrol Troopers Association ("Union"), and the State of Minnesota, Department of Public Safety ("Employer") in settlement and resolution of the pending disciplinary action against the Employee.

RECITALS

A. Employee has been notified by Employer that it intends to discipline Employee for conduct unbecoming an officer arising from an incident occurring on October 21, 1995 (the "Charges").

B. Employee and Union have expressed an intention to contest any disciplinary sanction pursuant to the procedures outlined in the Labor Agreement between the Union and the Employer.

C. Employer asserts that a disciplinary sanction is appropriate in view of the Charges.

D. The parties, seeking to avoid further costs, desire to resolve all disputes arising from this matter.

AGREEMENT

NOW, THEREFORE, the parties do hereby stipulate to this Settlement and Release in accordance with the following terms:

1. Probationary Period. The Probationary Period shall be that period from November 16, 1995, to November 15, 1996.

2. Conditions of Probationary Period. During the Probationary Period: Employee shall not engage in any conduct which results in a criminal conviction arising from charges of domestic violence or abuse; and Employee shall complete an appropriate (as determined by the director of the Employee Assistance Program maintained by the Employer) anger management counseling program.

3. Imposition of Discipline. Employer agrees that it will not presently impose any disciplinary sanction with regard to the Charges, and that any subsequent disciplinary sanctions with regard to the Charges will be imposed in accordance with the provisions of this Agreement. If Employee successfully meets the conditions of the Probationary Period, the Employer agrees that it will impose no disciplinary sanction with regard to the Charges. If Employee violates the conditions of the Probationary Period, Employer will impose a disciplinary sanction with regard to the Charges consisting of a suspension without pay for five (5) days.

4. Waiver of Grievance Rights. Employee agrees that this Agreement is made in full and final settlement of any appeal or protest to any disciplinary sanction which may be imposed by Employer with regard to the Charges and, accordingly, waives any right he may have to file a grievance or proceed to arbitration thereon. Employee does not waive his right to appeal or protest any disciplinary sanction which may be imposed for the conduct which caused the Conditions of Probation to be violated.

5. No Precedential Value. The parties agree that this Settlement and Release Agreement (including any facts and documents relating to the dispute): shall not be construed to set a precedent binding on any party with

regard to any other grievance or dispute relating to this Employee or any other state employee who is a member of the Union; and may not be offered as evidence of past disciplinary practices of the Employer in any subsequent arbitration proceeding.

6. Complete Agreement; Release of Claims. The terms and conditions of this Settlement and Release Agreement represent the complete and total agreement of the parties regarding the resolution of disciplinary sanctions relating to the Charges; and the consideration set forth herein constitutes total and complete satisfaction and waiver and release of any and all obligations, liabilities and claims that have been or may be alleged by either party against the other arising from this matter.

EMPLOYEE:

s/
Trooper I Bruce G. Brynell

UNION:

MINNESOTA STATE
PATROL TROOPERS
ASSOCIATION

s/
Corporal Dennis D. Olson,
President

EMPLOYER:

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY

s/
Colonel Michael P. Chabries, Chief

MINNESOTA STATE PATROL

SUPERVISORS REPORT OF TROOPER CONTACT

DISTRICT 2500

TROOPER CONTACTED:»Mark Kincade

DATE:»3-28-95

SUPERVISOR: »Lt. Al Kutz

REMARKS / EVENT:I had been hearing from a number of Troops that they were expressing concern about Trooper Kincade. The concerns were about his judgement (giving a female driver a lift from her disabled car, only to have one of his partners tow the vehicle shortly after that because it was a hazard in the lane, & the Patrol accident on I35 that Trooper Kincade stopped at while off duty, in his personal car, but obvious to the Troops on the scene that he had been drinking). There were also concerns about how he got along with his partners (reluctancy to take advice from senior Troopers), and attitude.

ACTION TAKEN / RECOMMENDATION: I met with Trooper Kincade on Penn Av. off I 394. In generalities, I told him that there were some concerns about his attitude, his working relationships with his partners, and judgement in some situations. I only brought up the hazard tow as an example. I offered him the opportunity to tell me if he felt there were any problems. He stated he knew of none, and was obviously very concerned about this matter. I told him I did not bring this up to upset him, only to let him know that

this should be something he should pay attention to, and work at fostering good relations with his partners. He said he appreciated me bringing this matter to his attention, and would strive to make an effort in this area in the future.

FOLLOW UP NEEDED: I will continue to observe Trooper Kincade. He came into the office on 4-3-95 and said he had a long talk with Trp. Richter. Mark told me Trp. Richter gave him some good advice, and offered some corrections to procedures used by Mark that were improper. Mark asked that I again contact him if I become aware of any more problems.

MINNESOTA STATE PATROL

SUPERVISORS REPORT OF TROOPER CONTACT

DISTRICT 2500

TROOPER CONTACTED:»Trp. Tim Peterson #157
DATE:»November 01, 1994
SUPERVISOR:»Lt. David J. Graham 2506

REMARKS / EVENT:LEAMON MAMIE RAYE of 6732 83rd Pl. in Brooklyn Park (phone #493-2908) stopped by the D/O to complain about the conduct of a Trooper who had stopped her October 28 while on I-94 @Dowling for speed and suspended object from the mirror. She states she wasn't going any faster than the rest of the traffic and she must have been stopped because she is black. She did not state how fast she thought she was going but admitted to be in a hurry to get to work.

She stated the Trooper said "give me your license (the corner was clipped), yellow paper D/L and insurance" and then went back to his squad. She started to walk back to talk to him and he "yelled" at her to get back into the car. She accused him of stopping her because she was black and was prejudice and he replied "don't give me that crap".

I told her that it was unsafe to have someone walk back towards us both for our safety and also their safety along the road and that was why she was told to remain in her vehicle. I asked her what she wanted done with this incident and she stated she wanted the Trooper to call and apologize for his conduct. I advised her I would talk to the Trooper first to get his side of the story and get back to her.

ACTION TAKEN / RECOMMENDATION:I talked to Trp. Peterson the same date and asked if he remembered the incident and gave him the name. He stated he remembered it very well. He stated he was following a car with WX plates when RAYE passed him at about 66 mph. He paced her for awhile and then finally stopped her. He states he talked to her very polite and asked for the D/L, yellow copy and insurance. He admits yelling at her to stay in her vehicle for the same reasons I gave her. She accused him of stopping her because she was black and he told her that was not true. She wanted to argue about it and he gave her the copy on the warning and left.

FOLLOW UP NEEDED:I have been with Tim on several stops and incidents and don't believe him to be prejudice at all. I advised him that several Troopers tape record all traffic stops just for this reason and their own protection.

MINNESOTA STATE PATROL

SUPERVISORS REPORT OF TROOPER CONTACT

DISTRICT 2500

TROOPER CONTACTED:»Trp. Mark Kincade #186

DATE:»03-14-95

SUPERVISOR:»Lt. David J. Graham 2506

REMARKS / EVENT:We've been hearing from several Troopers (Richter #196, Fahning #283 and they state several have talked to them) that Mark is not getting along well with his partners and they have some concerns about him. I was told of an incident that happened earlier this winter involving Mark when he was off duty and stopped at an accident scene where Trp. Burgess #81 had been hit and Richter said I should speak with Burgess about it.

I was also told of an incident last week where Mark found a vehicle on 94 that was several feet into the lane of travel and he transported the people off the freeway and told them they had 4 hrs to move the vehicle. Trp Fahning found the vehicle and considered it a hazard and towed it and the owners complained. Fahning states he did talk to Capt Mengelkoch about this also.

ACTION TAKEN / RECOMMENDATION:On 03-14-95 I met Trp. Burgess at @2300 hours in the Lund's parking lot at 62 / Penn and spoke with him about the incident. He states he had been writing an accident when a vehicle struck his squad from the rear. Apparently this vehicle had passed Kincade just prior to striking Burgess and Mark stopped at the accident

scene. Burgess states he did not know who this was and comments were made by Kincade to the driver that were not appropriate when he was off duty and not working the accident. Other Troopers at the scene were Trp. Todd Swanson and Trp Rick Wegner. According to Burgess, all three observed that Kincade had "obviously" been drinking, but no further tests were done. He was told to leave the scene but showed up again after the vehicles involved in the accident moved off of the freeway. Burgess states that they would not have let Kincade drive if they thought he was not able to and would have called a supervisor, but states he showed "poor judgement".

FOLLOW UP NEEDED:Talk about at next Lt. meeting

MINNESOTA STATE PATROL

SUPERVISORS REPORT OF TROOPER CONTACT

DISTRICT 2500

TROOPER CONTACTED:»John Korth

DATE:»9-27-94

SUPERVISOR:»Lt. Al Kutz

REMARKS / EVENT:I had received a complaint over the phone from a Mr. Jay Krueger on 9-25-94 (see enclosed complaint). Given the time, location, a description, I assumed it to be Trooper Korth. On 9-27, I had a ride a long scheduled with him. During the course of our travels, Trooper Korth mentioned a guy walking up to him on 94 two days earlier. As he relayed this, I recognized it to be Mr. Krueger. Trooper Korth said he told Mr. Krueger "You could get shot doing that", not the quote Mr. Krueger told me of. I expressed to Trooper Korth that Mr. Krueger wanted to be helpful and was threatened and frightened by him. Trooper Korth told me that Mr. Krueger left before he had time to tell him that he had a car pulled over and was tied up with the driver, and therefore wished that Mr. Krueger would have waited until Trooper Korth was free. I again mentioned to Trooper Korth that Mr. Krueger wanted to let him know right away since he believed the truck might have been on fire. Trooper Korth replied that he had already checked the truck, and it was not a problem. I'm unsure how Mr. Krueger would have known that.

ACTION TAKEN / RECOMMENDATION:I just discussed the situation with Trooper Korth and told him how Mr. Krueger did not want to pursue it, just to relay his concerns to the Trooper involved. Trooper Korth told me of a possible complaint from an Asian male he had stopped on 9-25. He told me this information on 9-26. As of this date, nothing has come in. A written complaint has come in from another party accusing Trooper Korth of intimidating behavior. At this time, I'm concerned about how he is coming across to the public. I'll ride with him again in the future and observe. He only had the chance to deal with one driver when I rode with him.

FOLLOW- UP NEEDED:I'll ride with him again. I'm going to call Mr. Krueger back and let him know I relayed his concerns to the Trooper.

Lt. Al Kutz

9-29-94

MINNESOTA STATE PATROL

SUPERVISORS REPORT OF TROOPER CONTACT

DISTRICT 2500

TROOPER CONTACTED:» SP157 Tim Peterson

DATE:» 7/7/94

SUPERVISOR:» Lt Al Smith

REMARKS / EVENT:

I was told by Trooper Cartwright that during the heavy rain at approx 1730 hours he saw a car traveling eastbound on I-94 at a speed that was unreasonable for the weather and road conditions at the time. Cartwright stated that when he pulled up on the car he saw that the party was wearing a State Patrol uniform and that when the registration was checked the car registered to Trooper Peterson

ACTION TAKEN / RECOMMENDATION:

I met Trooper Peterson at the District Office the same night, prior to the start of his 1900-0300 shift with FTO.

I advised him of what I had been told. He stated that he is still living in Little Falls and driving back and forth each day, but that he is looking for an apartment in the Twin Cities.

FOLLOW UP NEEDED:

None at this time. Watch to see that Peterson does obtain residence in compliance with policy.

MINNESOTA STATE PATROL

SUPERVISORS REPORT OF TROOPER CONTACT

DISTRICT 2500

TROOPER CONTACTED:»John Korth

DATE:»12-14-94

SUPERVISOR:»Lt. A. Kutz

REMARKS / EVENT:I had heard from 3 different Troopers who were concerned with Trooper Korth. They all expressed dissatisfaction in the areas of answering and taking calls, over use of 10-38, and not being a "team player", rather only looking out for himself. The 3 Troopers cited specific events in order to substantiate their claims.

ACTION TAKEN / RECOMMENDATION:I had Trooper Korth come into the office to discuss the problem, or perceived problem since I had not noticed anything personally, or from the monthly statistics that would back up what I was hearing. Trooper Korth was very upset by what I was implying. He stated he was busting his butt, writing his share of the accidents, writing activity, and pulling his share of the load. Although I wouldn't say, he said he knew who would say things against him. He admitted there was a personality conflict between him and some of his partners, but he tried not to let that affect him, and he just wanted to do his job. He mentioned he had spoken to Sue Hackett in rookie school who told him he had to put personalities aside, be professional, and do his job. Trooper Korth stated he thought some Troopers were worried about their jobs and were

therefore racing each other to accidents, even going code 3 to 10-50's on the shoulder. He said some of his partners were so quick on the mike, that it appeared they took all the calls.

FOLLOW UP NEEDED:I told him I was not accusing him of anything, I just wanted to make him aware of what I was hearing-whether it was factual or perceived on their part. I told him I would monitor radio better. I will continue to monitor all, check activity, and keep my ears open.

MINNESOTA STATE PATROL

SUPERVISORS REPORT OF TROOPER CONTACT

DISTRICT 2500

TROOPER CONTACTED:»John Korth SP 120

DATE: > 10-04-94

SUPERVISOR:»Lt. Al Kutz

REMARKS / EVENT:I brought Trooper Korth into the office to discuss a written complaint against him initiated by Christopher Schwede (see accompanying complaint). Trooper Korth was accused by Mr. Schwede of intimidation, arrogance, and a threatening attitude. I let Trooper Korth read the complaint. Trooper Korth disagreed with items in the complaint, ie. grabbing his neck, the "You are going to jail" statement, and others. He did say that given the facts that the car slowed as he tried to slow, that Schwede had a pager on, Schwede's age and the cars year and condition caused Trooper Korth to think there might be more to this than an expired tab stop. He did say that he might have appeared to be intimidating given the above reasons, but he did not remember the stop entirely. Trooper Korth tended to downplay, in my opinion, Mr. Schwede's concerns.

ACTION TAKEN / RECOMMENDATION:I told Trooper Korth that we all observe signs, signals, that make us take note and raise our awareness. I told him we have to walk a tightrope, while being aware of changing circumstances, to continue to communicate on a professional basis. Trooper

Korth stated he understood what I was talking about, and would work on this in the future.

FOLLOW UP NEEDED:I will continue to monitor Trooper Korths activity and try to observe him in traffic stops in the future.

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
Attorney General

May 23, 1997

Ms. Darlene Porter
EEOC - Minneapolis Office
330 Second Avenue South #430
Minneapolis, MN 5401-2223

Re: Ann B. Bogren v. Department of Public Safety
Charge No. 265960506

Dear Ms. Porter:

The following information is provided by the Minnesota Department of Public Safety in response to your investigation in the above-referenced matter. As demonstrated by the numerous documents produced by the Department and the information provided by Captain Steve Mengelkoch, Lieutenant Gary Peper, Lieutenant Thomas Fraser, Lieutenant Al Kurt, Lieutenant Mark Peterson, and Field Training Officers Brian Polansky, Todd Waxburg and Michael Miller, the charge of sex and race discrimination made by Ann M. Bogren is not valid and is without merit.

Please make this submission part of the files and records of your investigation.

Very truly yours,

s/

KRISTIN JONES PIERRE
Assistant Attorney General

(612) 282-5720

Enclosure

pc: Michael Bloyer
w/enc.

Re: Ann B. Bogren v. Department of Public Safety
Charge No. 265960506

Ann Bogren entered the Minnesota State Trooper Academy via the Peace Officers Career Opportunity Program ("POCOP"). This program was specifically developed and administered by the law enforcement community in an effort to recruit non-traditional applicants, including women and minorities. Lt. Mark Peterson, who conducted Ms. Bogren's background investigation, identified a number of areas of concern which are consistent with her ultimate performance with the Minnesota State Patrol. Most notably, Ms. Bogren had a number of traffic violations, including driving after suspension, and displayed a history of tardiness. Nevertheless, in an effort to diversify, the Department of Public Safety allowed Ms. Bogren to continue in the selection process. After completing the Training Academy, Ms. Bogren was sworn in as a Minnesota State Trooper. However, on November 14, 1995, Ms. Bogren's probationary appointment[1] was non-certified for non-discriminatory reasons.

I. Ms. Bogren Was Non-Certified Because She Engaged In Criminal Behavior.

First and foremost, Ms. Bogren's probationary appointment with the Minnesota State Patrol was non-certified because she was arrested following a domestic incident involving her former boyfriend, Steve Johnson. As the police reports states, on October 22, 1995 at 11:18 p.m., Columbia Heights Police Officer William Schmidt responded to 5029 6th Street, Columbia Heights, Minnesota, to the home of Steve Johnson. Mr. Johnson reported that Ms. Bogren

[1] Pursuant to the collective bargaining agreement, all troopers must serve a probationary appointment of 12 months. Agreement, art. 15, § 6.

threw four oriental cups onto his kitchen floor following an argument with him. Officer Schmidt contacted Ms. Bogren by telephone and she admitted that she was at Mr. Johnson's house, they argued, and "she threw down four Oriental 'items' that she had bought him." Officer Schmidt exercised his discretion and decided to immediately charge Ms. Bogren with criminal damage to property in violation of Minnesota Statute § 609.595; he also advised Mr. Johnson how to obtain a restraining order. On November 15, 1995, Ms. Bogren pleaded guilty to the charge.

Minnesota State Troopers are employed primarily to provide law enforcement and public safety services to the State of Minnesota, including detecting and preventing crime. See State Trooper Positions Description; Minn. Stat. § 299D.03, subd. 1 (1996). Accordingly, there is as expectation that all law enforcement personnel remain law abiding in order to foster public respect and confidence in the State Patrol[2]. Pursuant to the General Orders,

> Members of the State Patrol shall conduct themselves in such manner, both on and off duty, that their behavior will not reflect adversely on the integrity of the organization. Members shall not conduct themselves in any manner which may
>
> * * *

[2] Moreover, Ms. Bogren took an oath "[t]o conduct [her]self at all times in accordance with the highest moral standards and never commit any act that will reflect discredit on the Minnesota State Patrol or any member thereof." See Oath of Minnesota State Patrol Trooper.

* * *

the time she came into your office?

A That's correct.

Q Did Fraser ever tell you whether or not he talked to any of the police officers involved?

A I don't recall.

(Whereupon, Mengelkoch Exhibit 13 was marked for identification by the court reporter.)

BY MR. MAVITY:

Q Lieutenant Colonel Mengelkoch, I want to hand you what's been marked as Mengelkoch Exhibit 13. I'm only going to ask you about a couple of pieces of information in this. This is a letter and memorandum written to the EEOC investigator by an assistant attorney general, Kristin Jones Pierre. If you want to read the whole thing, you can, but I'm not going to ask you about much of it. Would you like to read the whole thing, or do you just want to hear my questions? Do you want to read it?

A Yes, please. Okay.

Q I'd like to have you turn to page 100959, which I believe is the second page of Exhibit 13. See the paragraph Roman numeral one, Ms. Bogren was noncertified because she engaged in criminal behavior?

A Yes.

Q The first sentence states, quote, first and foremost, Ms. Bogren's probationary appointment with the Minnesota State Patrol was noncertified because she was arrested following a domestic incident involving her former boyfriend, Steve Johnson, close quotes. I read the first sentence of that first paragraph. That's not true, is it?

A She was not physically arrested.

Q Now, she was terminated on November 8; Correct?

A I thought it was November 12.

Q November 8 is the date that you told me --
A I'm sorry, November 14 was the day it was finally --
Q Well, she was terminated on the 8th though, wasn't she?
A No, I think the letter of termination says the 12th or 14th, doesn't it?
Q But you told her on November 8 that she either had to quit or she'd be fired; correct?
A And we gave her attorney the opportunity to present more information to us, and I think it was delayed.
Q You told her on November 8 that if she didn't quit she'd be fired; correct?
A That's correct.

(Whereupon, Mengelkoch Exhibit 14 was marked for identification by the court reporter.)

BY MR. MAVITY:

Q I'm going to show you Exhibit 14. As a matter of fact, on November 3 you also told her to turn in her badge and all of her equipment, didn't you?
A I don't remember this, but it appears so.
Q And on November 9, the next day, she came in and turned in all of her equipment which was checked off on this checklist, Exhibit 14, in the presence of Gary Peper; correct?
A According to this report, that's correct.
Q Do you have any doubt about the authenticity of this report?
A No, sir, I just don't have an independent recollection.
Q Do you recognize Peper's writing in the upper left-hand corner?
A Yes, I do. That's his writing.
Q So she was told by you that she either could resign or she would be terminated on November 8; correct?
A Yes.
Q And at that time she had not pled guilty to any charge, had she?
A Not that I'm aware of.

Q So her guilty plea to a petty misdemeanor was not a factor in your decision to terminate her, was it?
A That's correct.
Q Would you look on the -- page -- it's page 2 of this report. It's Bates number 100960.
A On which report, sir?
Q I'm sorry.
A Exhibit 13?
Q Exhibit 13.

MR. LALLY: For the transcript, have we identified what Exhibit 13 is?

MR. MAVITY: Sure. We haven't, but I will. Exhibit 13 is a document prepared by Mrs. Kristin Jones Pierre for the investigator, Darlene Porter, of the EEOC which we initially obtained from the EEOC investigative file. Is that sufficient for identification?

MR. LALLY: Sure. And Ms. Kristin Jones Pierre was an assistant attorney general. It was prepared by the attorney general's office and not by the Minnesota State Patrol.

BY MR. MAVITY:
Q Now, on page 100960. In the last paragraph before the Roman numeral two paragraph at the bottom.
A Yes.
Q Do you see the last sentence? It says, quote -- or the next to last sentence. It says, quote, as Captain Mengelkoch stated, probationary troopers who are arrested while on probation are noncertified, close quotes. Do you see that?
A Yes, I do.
Q That doesn't apply to Bogren's case, does it?
A She was not arrested. Is that what you're asking me?
Q Yes.
A She was not arrested.
Q She wasn't noncertified because she was arrested; correct?

A She was not -- she was not non -- not certified because she was arrested; that's correct.
Q Now, I believe that -- strike that. If you turn to the next page. On the first full paragraph. It starts based on this information. Do you see that?
A Yes.
Q Do you believe that that's accurate that you did file a complaint with the internal affairs?
A I think that's accurate.
Q And that would be on October 26, 1995; correct?
A Yes.
Q And that would be a complaint that Bogren had engaged in conduct unbecoming an officer; correct?
A I don't remember what the charges were, sir. Okay, charges -- I have no independent recollection, but I assume from this it is.
Q Do you recall who made the decision to appoint Lieutenant Fraser as the investigator for the internal affairs complaint that you signed?
A No, sir, I don't.
Q Would you have made that decision?
A I don't recall.
Q Isn't the district commander the person who can determine who's going to investigate a complaint against one of his or her troopers?
A Depending on how it comes out from our internal affairs division, I assume it would have input probably. I don't recall it.
Q Do you see the reference to appointing Fraser as a, quote, temporary investigator, close quotes?
A Where are you at, sir?
Q The second full paragraph that begins after receiving the complaint.
A Oh, the second full paragraph. Right. It appears from this that the internal affairs division referred it back and

appointed Lieutenant Fraser as a temporary investigator. I just don't recall that though.

Q Okay.

A Or why they would have.

Q Looking at the term temporary investigator. Have you ever heard that term used in the course of an internal affairs investigation?

A No.

Q It doesn't make any sense, does it?

A I don't know if it makes sense or not. I --

Q Well, does it make any sense to you that someone would be a temporary investigator?

A Sure. We have full-time investigators in the office. And if somebody was going to do it that's not full time, they would be on temporary assigned to it.

Q Do you know what this reference means that -- the reference that begins appointed Lieutenant Fraser as a temporary investigator to complete the investigation?

A Do I know what it means?

Q Yes.

A Yes.

Q What does it means?

A It appears to me that internal affairs asked him to do the investigation on a temporary basis because he's not assigned there.

Q Because he's not assigned to internal affairs?

A Right. But I just don't recall, sir.

Q I want to talk with you a little bit about internal investigations, generally as background for this particular internal affairs investigation. Is there a set of criteria or a procedure that is followed in determining who is going to do the investigation pursuant to a signed complaint referred to internal affairs?

A I don't know if there's a set policy. It depends on the circumstances.

Q Now, I'm aware of some that have been referred to internal affairs involving 2500 troopers where Anthony will -- you know, Captain Anthony will assign an investigator like Janicek to do the investigation?
A That's correct.
Q I'm aware of others where an internal affairs

* * *

version of what happened as he described it to Fraser in a different light? This person did not hear what occurred. I would agree with you that much. In my opinion there are still grave concerns on it.

Q What are the grave concerns?

A In the totality, the person had gone to this house. I mean, there's no background on this. All there is is what occurred there and what she heard from a back room.

Q She could hear the TV; correct?

A And I assume the TV was back there. That's why she could hear the TV.

Q Isn't it true, Lieutenant Colonel Mengelkoch, that this incident on October 22 was nothing more than an argument, not even a loud argument, between two people who had been dating, and in the course of that argument some glasses were broken? This conduct is nothing more than that, is it?

A Yes.

Q What more than that is it?

A I was agreeing with you.

Q You're saying it's nothing more -- there's --

A It's an argument that somebody was charged with, and conduct that was illegal occurred.

Q Now, Bogren was charged based on a complaint from Steve Johnson; correct?

A Bogren was charged by the police department?

Q Yes.

A You'd have to check with them. I assume so.

Q Bogren was charged by virtue of being given a citation or a ticket? That's a charge, isn't it?

A That's correct.

Q Do they call it a tab charge?

A No, they call -- it's a citation. I'm sure she was given a citation.

Q And that information -- that tag was based on Johnson's report and a conversation that Officer Schmidt had with Bogren where she told him that she did throw glasses to the floor; correct?

A I can't answer what the police officer charged him -- what he used to base his charges.

Q Wasn't that important for you to know when you filed a complaint of conduct unbecoming a trooper?

A Again, my feeling on the whole thing was -- it was irregardless if she had been charged or not. The actions that she was involved in, the loss of control of her anger management. Those were the things. A conviction of the charge happened to occur with it. But the actions regardless of the charge were inappropriate.

Q Is there any other information, any facts, any evidence other than Steve Johnson's report to Fraser that Bogren lost control, lost her temper, had problems with anger management?

A I think in her statement it alludes to that, that she gave.

Q Alludes to what?

A Her anger at this incident. The statement that she gave to Lieutenant Fraser with her attorney.

Q I'm aware of the statement. I'm just wondering if there's anything more involved here than a fight between a boyfriend and a girlfriend as far as you're concerned.

MR. CORWIN: Objection. Asked and answered.

THE WITNESS: Am I supposed to go for it? Yes, there was an incident -- I can't give you a yes or no answer, Bill.

BY MR. MAVITY:

Q And yet you terminated Bogren primarily because of the incident on October 22, 1995; correct?

A That was one of the issues that was involved, yes.

Q That was the primary and foremost reason for her termination, wasn't it?

A In my mind that was the most serious of the allegations.

Q Other than the October 22 incident and Steve Johnson's statement to Thomas Fraser, I want you to tell me all of the facts that you are aware of that suggest to you that Bogren had trouble managing her anger.

A In addition to which one?

Q The October 22 incident and Johnson's description of that to Fraser.

A Okay. In retrospect, after looking at everything today, the incident on the phone where Lieutenant Hodapp indicated she had raised her voice. The incidents with Trooper Polansky and the incident with Trooper Klute.

Q Now, the incident on the phone where Hodapp said that Bogren raised her voice, that only appears in the November 11 report; correct?

A That's correct.

Q It didn't appear in the other reports made by Hodapp or Ludford, did it?

A Not that I recall that I saw.

Q So it's an undocumented report of poor anger control; correct?

A This is a probationary employee, and it was an

* * *

* * *

you weren't aware of Bogren having made any like comments -- in other words, comments like those set forth in paragraph one of this topic -- to any of her co-workers, were you?

A I can't answer that because I do not recall.

Q Do you have any -- even a dim memory of anybody ever telling you that she made such comments?

MR. LALLY: Objection. Repetitive.

THE WITNESS: I do not recall.

BY MR. MAVITY:

Q One way or the other?

A One way or the other.

Q If people had told you that Bogren made those kind of comments, would you have documented that or made some note about it?

A Sir, I had 38 probationary employees at this time. I just can't remember.

Q If someone had told you that she had made those kind of comments, do you believe that you would have made some kind of note or written documentation about it?

A That I would have documented it, no. Somebody would have documented it in the process probably, but I would not have.

Q Let me show you what has been marked for identification as Exhibit 19. Have you ever seen Exhibit 19 before?

A I don't recall seeing it.

Q. Okay. Let me show you what has been marked as Exhibit 20. It's a two-page copy of a St. Paul Pioneer Press news article appearing in the Press on October 24, 1995, two days after the incident that Bogren was involved in at the Johnson home. Take the time you need to read it, and I just want to ask you a couple questions about it.

A Okay.

Q Do you know Trooper Bruce Brynell?

A Yes, sir, I do.
Q Is he still on the patrol?
A Yes, sir, he is.
Q Do you know whether or not there was an internal affairs investigation based on his having been arrested by the White Bear Lake police on October 21, 1995?
A I don't have an independent knowledge, but I assume so.
Q Do you consider what you read in this account regarding Bruce Brynell's conduct -- do you consider that conduct to be more serious or less serious than the conduct of Ann Bogren at Johnson's residence on October 22?

MR. CORWIN: Objection. Lack of foundation.

THE WITNESS: I would say it's more serious.

BY MR. MAVITY:
Q There was no allegation of any assault by Bogren on October 22, 1995, was there?
A No.
Q Is Sergeant Teigen still on the State Patrol?
A Yes, he is.
Q Do you consider Teigen's arrest for DWI and criminal sexual conduct and disorderly conduct to be more serious than Bogren's conduct on October 22?
A Yes, I do.
Q Are the probationary troopers held to a higher standard than regular state troopers with regard to their conduct?
A They're both held to higher standards. We certainly have more ability to take action against probationary employers.
Q You say they're both held to higher standards. I think you missed my question. My question was, are certified sworn troopers, people that are off probation, held to a higher standard of conduct -- strike that. Let me start again. Are probationary troopers held to a higher standard of conduct than that standard to which sworn certified troopers are held to?
A I don't believe so.

MR. MAVITY: That maybe all I have. Let me just take a moment to check my notes. I have nothing further.

MR. LALLY: We'll read and sign.

(Deposition concluded at 2:50 p.m.)

* * *

Statements bearing upon Tim Bowe's allegations of harassment in violation of Minnesota Department of Public Safety Policy 95-10-002.

Trooper Dennis O'Brien will testify that during the period when Bowe's daughter was real sick, when Bowe was using some sick time, he heard Fraser make accusations that Bowe was "using the system" or "milking the system" and putting his partners at a disadvantage because he was gone so much by taking advantage of sick time.

O'Brien heard Lt. Fraser in the presence of other Troopers make disparaging remarks about Bowe because of Bowe's involvement in an off duty business attempting to sell breath testing devices to liquor establishments. During that conversation Lt. Fraser accused Bowe of using his influence and position in an inappropriate or unprofessional manner in this endeavor and with manipulating his schedule to serve the needs of his business at the expense of his real job.

Trooper George Bonnell will testify that during April of 1995, while having coffee with Lt. Fraser and two other Troopers who he believed were Holmes and Wicklund, Lt. Fraser stated that he had been going over overtime logs and that he didn't understand how Bowe could complain about "SRT" overtime and that Bowe had threatened to file a grievance which would jeopardize the "SRT" Team.

Bonnell can further testify that during dinner with Lt Fraser, Troopers Frizby and Herman on what he believed to be March 13, 1995, Fraser stated they anyone who says anything derogatory or bad about him to the investigator in the Bowe complaint, he will sue. Fraser further stated that Bowe threw a

copy of the District 2500 roster at the Chief when he asked if Bowe had any witnesses to his complaint.

Lt. Klawitter can testify that on December 18, 1994 while at SRT training, he informed Bowe that Lt. Fraser stated the following things about Bowe prior to their training session: "Tim is only out for Tim. Tim only cares about himself, Tim only does what's good for Tim." Fraser informed Klawitter that the only reason Bowe went to the Governor's detail was to make a bunch of overtime and when he wasn't making the overtime he came back on the road.

Trooper Snyder can testify that he heard Fraser on several occasions state that Bowe was only out for himself. He further heard Fraser state that Bowe was a "hell raiser" in high school and people can't believe that he got hired as a Trooper. He recalls Fraser saying that Bowe took advantage of I.O.D. and sick leave and that Bowe "screws" his partners.

Trooper Suess can testify that he heard Lt. Fraser state that Bowe was only out for himself and that he didn't care for Bowe. He can further confirm that Fraser reported that Bowe was wild in high school and that people couldn't believe that Bowe was a State Trooper. Suess further can recall Fraser commenting upon Bowe's use of sick time.

Trooper Freng can testify that while at the Training Center he was approached by Lt. Fraser and Smith who told him that he should be careful about using Bowe as an instructor because Bowe was only out for himself. Further that when Fraser resigned from the SRT Team he stated that they should be picking better people for the team, people who were better district Troopers and that guys like Fallen, Schlosser and Bowe shouldn't be on the team because they're not good troops and it just shows that the wrong people are being picked. Freng can further testify that Fraser was using very

foul language when referring to Bowe and used such terms as "fucking asshole."

Based upon the above it would seem that there has been a clear violation of the General Harassment Policy. Bowe was subject to "intimidation, ridicule, degradation with the purpose or effect of interfering with or jeopardizing his employment and career opportunities." Further, Lt Fraser's conduct created "an intimidating, hostile and offensive employment environment" for Trooper Bowe.

These cannot be portrayed as negative effects an employee may experience as a result of actions taken by a supervisor that are within the scope of the supervisor's responsibilities and would be considered reasonable and appropriate actions. The scope of a supervisor's responsibility involve a number of duties including: training, direction, orientation, counseling evaluating and disciplining. They do not include the type of conduct Lt. Fraser involved himself in which included rumor mongering and gossiping about various Trooper to their peers. Nor does appropriate supervisory behavior involve disadvantaging a subordinate by influencing others to deny assignments and career opportunities to that person, nor cast the subordinate in an unfavorable light so as to negatively effect his working relationship with peers.

Trooper George Bonnell, 800 74 1/2 Ave. N. Brooklyn Park 55444 566-0225

Bonnell stated that he does not get along with Tom Frazer and was generally critical of his supervisory style. With regard to Tim Bowe, Bonnell related the following;

Sometime during April of 1995, while having coffee with Tom Frazer and two other Troopers who he believed were Holmes and Wicklund, Lt. Frazer stated that he had been

going over overtime logs and that he didn't understand how Bowe could complain about "SRT" overtime and that Bowe had threatened to file a grievance which would jeopardize the "SRT" Team.

During dinner with Frazer, Troopers Frizby and Herman on what He believed to be March 13, 1995, Frazer stated that anyone who says anything derogatory or bad about him to the investigator in the Bowe complaint, he will sue. Frazer further stated that Bowe threw a copy of the District 2500 roster at the Chief when he asked if Bowe had any witnesses to his complaint.

During this same meal break, Frazer was discussing the suspension of five supervisors and he referred to the Chief as "Mr. Potato Head." Further, Frazer stated that Ann Beers was incompetent and had no leadership experience. He expressed the opinion that if someone would "take care of her" she would be a better supervisor.

This interview was conducted with Trooper George Bonnell at his home on Wednesday June 14, 1995 at 10 A.M.

D. Gorski June 20, 1995

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Doreen A. Genosky,

Plaintiff,

vs. File No. 97-411 ADM/JGL

The State of Minnesota; Department of Public Safety; Donald Davis, Commissioner of the Department of Public Safety, in his official capacity; Minnesota State Patrol; Michael Chabries, Chief of the State Patrol, in his official capacity;

Lieutenant Thomas Fraser of the State Patrol, personally and individually; and

Lieutenant Lori Hodapp of the State Patrol, personally and individually,

Defendants.

DEPOSITION OF THOMAS FRASER, taken pursuant to Notice, before Angie D. Threlkeld, Registered Professional

Reporter and notary public, at 1650 West 82nd Street, Suite 1460, Bloomington, Minnesota, on September 4, 1998, commencing at approximately 10:00 a.m.

* * *

APPEARANCES:

WILLIAM J. MAVITY, Attorney at Law, and PAMELA MILLER, Attorney at Law, 1650 West 82nd Street, Suite 1460, Bloomington, Minnesota 55431, appeared for and on behalf of the Plaintiff.

JOSEPH PL LALLY, Assistant Attorney General, 445 Minnesota Street, 900 NCL Tower, St. Paul, Minnesota 55101-2127, appeared for and on behalf of the State of Minnesota, Department of Public Safety, Donald Davis, Minnesota State Patrol, and Michael Chabries.

GREGG M. CORWIN, Attorney at Law, 1660 South Highway 100, 508 East Parkdale Plaza Building, St. Louis Park, Minnesota 55416-1534, appeared for and on behalf of Lieutenant Thomas Fraser and Lieutenant Lori Hodapp.

WHERUPON, the following proceedings were duly had and entered of record, to wit:

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WITNESS	PAGE
THOMAS FRASER	
Direct Examination by Mr. Mavity	4
FRASER DEPOSITION EXHIBITS:	
94 - Internal Affairs Complaint regarding Tim Bowe, dated 12/23/94	4
95 - Field Training and Evaluation Program Standard Evaluation Guidelines, Minnesota State Patrol	4
96 - Thomas Fraser's Daily Record of Events, dated 7/3/95 through 10/23/95	6

THOMAS FRASER.

After having been first duly sworn, was examined and testified on his oath as follows:

(Whereupon, Fraser Deposition Exhibits 94 and 95 were marked for identification by the court reporter.)

DIRECT EXAMINATION

BY MR. MAVITY:

Q Would you state your full name, please?

A Tom Fraser, F-R-A-S-E-R.

Q What's your address or the best address that we could use if we needed to reach you for court process?

A 2005 North Lilac Drive, Golden Valley, Minnesota 55421.

Q Mr. Fraser, my name is Bill Mavity. We met just briefly before we started. With me today is Pamela Miller who is another attorney of my staff. Your attorney, Greg Corwin, is here, of course. And you know Mr. Lally from the Attorney General's Office, I believe.

A Yes.

Q Have you ever had your deposition taken before?

A No.

Q Okay. Some guidelines that will hopefully get us

* * *

* * *

A Yes.
Q Did she ever make a complaint against you, as far as you know?
A No.
Q Do you -- How do you know Pam Liebl?
A She was a probationer in the 50 beat who eventually resigned.
Q You supervised her, did you, in her last several weeks as a probationary officer?
A Yes.
Q And you recall that you were involved in recommending her termination; correct?
A I don't think it ever got that far.
Q My question was: You went to Mengelkoch and told him that in your opinion she should be terminated; correct?
A No. I don't recall it -- I don't recall it going that way.
Q Do you recall going to an accident scene on the 94 ramp going into 394 after Liebl had been in an accident while en route to -- she had an accident while she was en route to the tunnel to investigate another accident?
A Yes.
Q And you recall that she hit a light pole on the ramp?
A Yes.
Q And you were very upset with her, weren't you?
A No.
Q In fact, as you got out of the car, you said to her at the scene, Stay in the fucking car so you don't fuck anything else up, didn't you?
A No.
Q There were other people around that heard you say that too, weren't there?
A Well, first of all, I didn't say it. So, therefore, no one else could have heard me. But, yes, there were other people

around. And she was walking around crying and acting like a blithering idiot, and I told her to stay in her car.

Q And you went to see Mengelkoch, and you told Mengelkoch that you didn't think she should stay on the patrol, didn't you?

A I don't remember -- I don't remember having the conversation with him. I'm sure there probably was one. I don't remember it specifically. If we had the conversation, I'm sure I probably would have recommended that.

Q Do you recall being in a meeting with Kutz and Mengelkoch and Liebl where you said you didn't think she should stay in the patrol?

A I don't remember where we had a meeting with her.

Q Do you recall Mengelkoch telling her that she had a choice, she could either resign or she'd be fired?

A I don't think I was at this thing because none of this sounds --

Q You don't have any memory of being at such a meeting in November of 1994?

A No. After the crash and after I sent her to the DO to do her paperwork, she left. And I was on days, and the next day some things happened, and I wasn't -- I don't think I was around for it.

Q Is it your testimony, as far as you know -- Strike that. Is it your testimony, Lieutenant Fraser, that you did not have a role or play some part in Liebl's being asked to leave the patrol?

A Oh, I probably played a big role in it. I wrote the accident. I told her to stay in her car because she was wandering around. I didn't want her to get run over. She was out of control. When it was over, I ordered her to the district office to do her paperwork. When she was done with the paperwork, I told her that, you know, the condition she was in, she wasn't capable of working any more. She was hysterical. We couldn't afford the risk of

putting her on the road. I ordered her directly home and told her to go 10-7 as soon as she got there, and we'd pay her the rest of the day.

I did my reports and I forwarded all that to Mengelkoch. So, oh, I'm sure I had -- I'm sure that in itself had some dealings in the final decision of whether she was kept or not, but which didn't happen; she quit.

Q She was one of several cars en route to a personal injury accident in the tunnel; correct?

A I believe there was two, her and Hammond.

Q Okay. And, if you recall, there was considerable traffic on the ramp, and she had her accident trying to pass traffic on the ramp, and she went out of control off the ramp and hit the pole; is that basically what you recall?

A That's paraphrasing it in her behalf with grand -- with grand ability there. But, in essence, that's what happened

Q Why don't you tell me then what you recall?

A Well, what happened was that she was flying up the left lane at about 80, 90 miles an hour or better and at the last second tried to cut in the front.

* * *

Rep. Andy Dawkins questions MN State Patrol's hiring record

"I am alarmed, deeply concerned, and determined to investigate the possibilities for a legislative solution to this problem," State Representative Andy Dawkins (DFL-St. Paul) said on learning that only twelve of Minnesota's 450 state troopers are minorities. "We must look into the hiring practices that have allowed this disturbing situation to occur," Rep. Dawkins added.

It has recently come to the attention of Minnesota legislators that minorities and women are seriously underrepresented on the Minnesota State Patrol. According to Rep. Dawkins, the State Patrol's ranks include on 33 women, six Native Americans, three Latino and three African American troopers.

"Not a single new African American state trooper has been put on the highway since 1977. Not one in twenty years. It is so startling as to seem unbelievable, but it is, in fact, the truth. Other law enforcement agencies in Minnesota have managed to successfully recruit and retain minority officers. We certainly need to understand why this has not been possible for the State Patrol," Rep. Dawkins said.

Other legislators have also expressed concern as to what these numbers may indicate about the State Patrol's hiring practices.



Rep. Andy Dawkins

State troopers earn an excellent salary and benefits, and therefore, it should not be difficult to recruit potential candidates.

"Not one minority candidate entered the State Patrol academy's most recent training program. We need to understand how and why this happened and consider ways to rectify this inequity as soon as possible," said Rep. Dawkins. "It seems clear that whatever efforts have been made to recruit and retain minorities and women troopers have been grossly unsuccessful," added Rep. Dawkins. Rep. Dawkins is interested in your feedback on this issue. Please contact him at Room 409 State Office Building, St. Paul, MN 5515-1298 or phone (612) 296-5158.

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Doreen A. Genosky,

Plaintiff,

vs. File No. 97-411 ADM/JGL

The State of Minnesota; Department of Public Safety; Donald Davis, Commissioner of the Department of Public Safety, in his official capacity; Minnesota State Patrol; Michael Chabries, Chief of the State Patrol, in his official capacity;

Lieutenant Thomas Fraser of the State Patrol, personally and individually; and

Lieutenant Lori Hodapp of the State Patrol, personally and individually,

Defendants.

AFFIDAVIT OF PAMELA LIEBL

STATE OF MINNESOTA)
) ss.
COUNTY OF _____)

Pamela Liebl, being first duly sworn, states as follows:

1. I am 27 years old and I live in St. Cloud, Minnesota, with my husband. I am a supervisor and event coordinator for

the Fingerhut Corporation. I was previously a law enforcement officer. I began my law enforcement career in Olivia, Minnesota, where I successfully completed my probationary period and was a police officer for 13 months. I then served as a probationary trooper with the Minnesota State Patrol from June 13, 1994, until I was forced to resign on November 3, 1994.

2. During my probationary period with the State Patrol, Lieutenants Tom Fraser and Al Kutz were my supervisors. I became aware, through my own observations and conversations with other female troopers, that Lt. Fraser was hostile, intimidating and unfair in his treatment of female troopers. I have personally experienced harassment, isolation and intimidation by Lt. Fraser. Lt. Fraser was often cordial with groups of male troopers but whenever a female trooper approached, Lt. Fraser would give the female an unfriendly look and leave the group, and then the group would disband. Because of my feelings of discomfort with Lt. Fraser, I went to Lt. Kutz when I needed supervisory assistance.

3. I have had two intimidating professional contacts with Lt. Fraser, the last of which resulted in my forced resignation from the State Patrol. On that first occasion, Lt. Fraser called me at my home and yelled at me for not having completed an accident report within the 72 hours allotted by the State Patrol. I explained to Lt. Fraser that I had been unable to reach a person who had information pertinent to the report. Lt. Fraser continued to chastise me and told me that this was a sign of "incompetency." I do not believe that male probationary troopers were chastised for the same things

4. On November 2, 1994, Lt. Fraser responded to an accident I had with my squad car. I have read that portion of Lt. Fraser's deposition testimony in the matter of Doreen Genosky v. The State of Minnesota, et al., concerning this accident. Lt. Fraser's testimony is grossly exaggerated and untruthful. I recall that when Lt. Fraser approached me at the scene, I was clearing glass and debris from the accident. I

clearly remember Lt. Fraser telling me, "stay in the fucking car so you don't fuck anything else up." When Lt. Fraser and I cleared the scene, we went directly to the 2550 station. Lt. Fraser followed me closely back to the station. He continued to follow close behind me as we walked into the station. After we entered the station, Lt. Fraser slammed the door. I was then called to a meeting with Captain Mengelkoch, and Lieutenants Fraser and Kutz. At the meeting, Captain Mengelkoch told me that he had witnesses who stated that I "broke down" at the scene. This is untruthful. Then, without the benefit of an investigation or knowledge of the facts of the accident, Captain Mengelkoch gave me an ultimatum: "resign or have your probation revoked." I was sent home to think about my decision.

5. On November 3, 1994, I tendered my resignation to Captain Mengelkoch. He told me that I made "a good choice." I was upset about having to resign because I was a good trooper. I received high marks and verbal praise from my Field Training Officer throughout my probationary period. After I resigned, while Lt. Hilligos was driving me [illegible] "I'm very sorry to see you leave. You were a good officer." Many other troopers [illegible] to hear that I had resigned. I believe that my termination was caused by Lt. Fraser's [illegible] toward me and his untruthful characterization of my accident and my demeanor.

Further your affiant sayeth not.

s/_____
Pamela Liebl

Subscribed and sworn to before me
this 24th day of September, 1998.

s/ Ken John Schueller
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Ann Bogren. Civil File No. 98-880 PAM/JGL

Plaintiff,

vs.

The State of Minnesota; Department of Public Safety, Donald Davis, Commissioner of the Department of Public Safety, in his official capacity; Minnesota State Patrol; Ann Beers, Chief of the State Patrol, in her official capacity;

Lieutenant Thomas Fraser of the State Patrol, personally and individually; and

Lieutenant Lori Hodapp of the State Patrol, personally and individually; and

Lieutenant Colonel Stephen Mengelkoch of the State Patrol, personally and individually,

Defendants.

AFFIDAVIT OF MELVONS N. LOCKHART

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Melvons N. Lockhart, being first duly sworn, states as follows:

1. I am a 46 year old black male. I live in Menahga, Minnesota. I was a Minnesota State Trooper from August 1976 until February, 1999. 1 was last assigned to the District 2900 Station in Detroit Lakes, Minnesota where I worked as the District Investigator.

2. I am providing this affidavit at the request of William J. Mavity, who I understand is an attorney representing Ann Bogren, a police officer with the City of Eden Prairie, Minnesota. I understand that Bogren has brought a federal lawsuit against the Minnesota State Patrol and three Patrol supervisors, Lieutenants Thomas Fraser and Lori Hodapp and Lieutenant Colonel Steven Mengelkoch. I have personal knowledge of the facts which follow except where I state that the information has come to me from other sources.

3. Over the past 22 years, I was frequently subjected to a work environment by the State Patrol that was offensive, hostile and discriminatory to me because of my race and color. In talking with a number of the other persons of color who are or were State Troopers, I believe that the State Patrol has been callously indifferent to the racially discriminatory conduct occurring within the organization during that time. Other persons of color who have told me that they have experienced racially discriminatory treatment in the workplace at the State Patrol include former Trooper Gene Shockency (African-American), former Trooper Steve West (African-American), Major Dennis Lazenberry (African American), Trooper Randy Goodwin (Native-American), and Trooper Gaylen Williams (African-American).

4. In July, 1998, I filed a formal complaint against Lieutenant Lori Hodapp and the Patrol of employment discrimination based on race with the Department of Public Safety's Equal Opportunity officer, Mr. Bob King. On July 21, 1998 1 sent Mr. King a letter in support of my complaint detailing some of the examples of discrimination I had experienced while performing my duties as a State Trooper. A true and correct copy of this letter is attached hereto as Exhibit A.

5 My complaint against Lt. Hodapp involved her conduct towards me and comments made in my presence while I was participating in meetings of the Patrol's Minority Hiring and Recruitment group. I initially was named the Coordinator of the group. Our purpose was to design a process that would attract qualified minority applicants, including people of color, to the Minnesota State Patrol. I ended my participation in the group when it became clear to me that Lt. Hodapp, I believe now with the knowledge and support of the Patrol administration, was doing whatever she could to derail and frustrate my efforts to focus the group's efforts on the recruitment of people of color. She accused me of wanting to lower the requirements and standards for minority applicants. She made it clear that her role on the committee was to fight to retain the Patrol as a White male work force.

6. Attached hereto as Exhibit B is a true and correct copy of my letter to Captain Al Smith, the Patrol's Director of Training in 1998, stating that I was ending my participation with the group and some of the reasons for my decision.

7. With regard to Lt. Hodapp's conduct at meeting of the group, I believe that she directly opposed our minority recruitment efforts as they related to people of color, that she directly opposed my efforts in that regard, and that she wanted to direct the group's efforts away from any meaningful program of recruiting candidates of color. One of the primary factors in my decision to leave the Patrol in

February of 1999 was Hodapp's discriminatory conduct, the Patrol's unwillingness to do anything about it and its unwillingness to commit to a genuine effort of recruiting and hiring people of color as State Troopers.

Further your affiant says not.

Subscribed and sworn to before me
this 19th day of March, 1999

s/ April M. Virnig
Notary Public

s/
Mel Lockhart

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY

July 21, 1998

Mr. Bob King
Office Of Equal Opportunity
Department Of Public Safety
St. Paul, Minnesota 55101

Mr. King,

I am sending this correspondence to you in regards to my complaint that I have had to work in a "Discriminatory Atmosphere" as a Minnesota State Patrol Trooper.

The State Patrol general order which covers this area is PO 95-10-008. Please note that we didn't even have such a policy until 1995. Specifically our policy states, "It is the policy of the Minnesota Department of Public Safety that all its employees be able to work in an environment free from illegal discrimination and sexual harassment. It goes on to state that, all department employees are covered under this policy."

There will be additional information forthcoming with regards to persons mentioned here-in and others which I am still in the process of making contact with.

Chronological Order of Events

(1.) On August 26, 1976 a report of psychological summary and prognosis was sent to the Minnesota State Patrol on applicant Mel Lockhart. The Summary Prognosis was completed by Ph.D. Thomas M. Vessey and can be found in my State Patrol file at Central office.

The summary prognosis begins with, " Mr. Lockhart does not have strong intellectual abilities".

When I first read this summary, it immediately reminded me of the session with this psychologist in that my remembered feelings were that this individual harbored and relayed in word some negativity toward me. As I had never met him before and as this negative feeling came across in the same manner as previously experienced projections by persons of "color prejudice", I could only conclude that the same type of underlying prejudice was present here.

It is widely known that persons who are color prejudice, believe and express such belief that African Americans lack, are lacking and will never possess intellect (or in laymans terms) basic intelligence to equal or surpass their white counterparts.

The second college edition of the "American Heritage Dictionary" copyright 1985 by the Houghton Mifflin Company, defines intellect as **"the ability to learn and reason as distinguished from the ability to feel or will; the capacity for knowledge and understanding".** A comparison which has historically been related to the basic differences between man and animal. The definition concludes with direction to see intelligence. It is especially interesting to note that under the definition of intelligence, the designation to **show sound judgement and rational** compare directly to Mr. Thomas Vessey's comments under section #3 (psychological summary) of **"he shows good judgement** in crises and is able to handle stress and pressure well".

Mr. Vessey then concludes with some contradictory comments given as, **"he represents a good risk for the position of Trooper with the Minnesota State Patrol. Based on these considerations, we feel he represents a reasonable risk for such a position."** Are not (such a position) and (Trooper with the Minnesota State Patrol) one in the same? Is this then an after thought by Mr. Vessey to not portray me in too favorable a light while still giving the green light for hire?

(2.) In September of 1976, while a State Patrol trainee at the Minnesota State Patrol "rookie" school, I experienced the following:

a.) There was a significant time period where our class did not have direct supervision (pusher) because of some apparent lack in obtaining a person(s) to fill this position. Sgt. Al Golias was then assigned to our school. While speaking with Sgt. Golias one evening about our school, I inquired as to why there was a "shuffling" problem with staff being there? Sgt. Golias stated that I needed to understand that this was new to everyone. The first women and basically the first blacks being hired by the Minnesota State Patrol. **"Things are not going to be easy Mel, because Gene, (first African American descent Trooper already on the job) doesn't really appear black and hasn't been as threatening to them. Now here you guys are, no question about your color. Add to that the girls, and one of them is Indian, well, you can see what I mean. It is going to take some time that's all."**

b.) Outside staff person(s) would come to our school for inspection time and participate in conducting such. Ex-Capt. Ralph Potvin (on such a visit) expressed that he did not intend to let me out-do everyone else in a particular cleanliness area. (I used future floor wax on the inside of my garbage can to make it shine) **Capt. Potvin continued, attempting to say it under his breath, "trying to be a slick nigger are you?"** Mr. Potvin then picked up my can and put out his cigar against the inside wall. This action, by this staff person was repeated on two return visits with the demand being made that I wash his squad for the obvious "gig". Trooper Thomas Larson (active) was present on the first inspection by Mr. Potvin. Trooper Douglas Partyka (now in private sector) was present on one of the others. I believe Major Gene Halverson was also a roommate during one of these times.

c.) During certain classes of instruction it was not uncommon to hear mathematical signs compared to female

genitalia by an instructor. Current Chief Beers was present during these comments. Also the reference was made of "brillo pad" hair, which in my opinion was directed to Trooper Greg Darby and myself. It should be noted that Lt. Sue Hackett and retired Trooper Ruth Witner were also members of this Patrol class.

(3.) In approximately August of 1977, I received a call from radio to go to the Minneapolis police department and pick up a rider. Upon my arrival I was met by a duty officer who told me he had a drunk off duty Trooper inside that was becoming a problem. The duty officer asked if I could transport the off duty Trooper to his residence. As I approached the off duty Trooper I immediately recognized that this person was **Capt. Ralph Potvin. Mr. Potvin was yelling at the top of his voice, "I'm a goddam State Patrol Captain". "Do you know who I am?"** While inside my patrol unit Captain Potvin stated to me, **"we have 500 guys working for me, how the hell did I draw you?"**

(4.) In approximately 1979, I sent a letter to Captain Lenz of the State Patrol Training Academy in reference to forming a State Patrol tactical unit. I made a detailed suggestion of how such a unit should be formed and our possible usage in large riot control situations. I outlined my training with the United States Marine Corps Military Police and the Illinois State Police riot unit.

The Minnesota State Patrol then formed such a unit as described above, however no requests were made of me in regards to participation or training.

I sent another letter to Captain Lenz basically asking to participate, however never received a reply. I then made inquiries with other Troopers and I believe it was (now) Captain Mike Asleson, who informed me that Captain Lenz had some prejudicial feelings and didn't want me a part of his unit. There were at least two Troopers at the time who informed me of Captain Lenz's feelings and I am currently gathering this info.

*****It should be noted that Trooper Scott McAllen who was assigned to the training center for many years, will support and validate these claims of discriminatory atmosphere for both females and persons of color. Trooper McAllen also has knowledge of and insight about Chief Chabries in reference to my claims, as well as other matters involving the general treatment by this organization of African and Native Americans.*****

(5.) In approximately 1978-79 Trooper Douglas Partyka transferred over to the BCA. During the time of his making the request and transfer, I also made such request and transfer. My request was however met with this comment from the BCA field supervisor at the time: **"we already have some major problems with a black agent and now really isn't a good time".** Trooper/Special Agent (now) civilian Doug Partyka is aware of this response and the reality that there were in fact some type of concerns with a black BCA agent at that time.

(6.) In approximately 1980 I recovered a stolen semi rig while working on north 35W. The FBI subpoenaed me for court in Madison, Wisconsin. The District Capt. was in contact with the FBI agent who setup the matter and I departed with squad to Madison, Wisconsin. Upon my return, I was called in to the district office by Sgt. John Thielen and while in front of all office personnel, Sgt. Thielen began to yell and scream at me about not being around for duty, failing to report to work, etc. etc. When I attempted to inform him of my court requirement and the Captains knowledge and permission, he told me to shut my "black" mouth, mister. Sgt. Thielen later that week asked me to meet him on north 35W where I got into his car and he very reluctantly apologized about the matter at the office.

(7.) In approximately 1981, I participated in an arranged off duty wood cutting venture with Trooper George Bonnell, the Coon Rapids City Manager and an older man with a dog. This took place at the Coon Rapids city park.

At some point while cutting wood, Trooper Bonnell and myself stopped because we heard what sounded like two dogs fighting ferociously. We then walked down to a path area and discovered that the older man's (somehow connected to the Coon Rapids city manager) dog was in a small fight with the dog of two (intoxicated and still drinking) individuals who were passing through the woods. The two men (at the time of our arrival) were beginning to threaten the older man and at this point, I stepped in and identified myself (with State Patrol I.D.) and advised the two to leave the park area or we would hold them for Coon Rapids Police. The two men then left and the matter seemed to be terminated.

Approximately 1 to 2 weeks later (while working the late shift) I received a call (immediately when I came to work) to meet with the District Sergeant, Sgt. Jack Larson. Sgt. Larson asked to meet me at the Tali Ho Cafe in Elk River. Upon my arrival at the cafe, I found that Sgt. Larson had selected a table at the very rear of the establishment and as I approached, stated **"I knew we were going to have problems with <u>you people</u>. You really did it this time Mel. (whatever this time meant) Unauthorized use of police authority in an off duty status. If you admit to your mistake now, the Captain (Leo Foley) and I think we can limit your discipline to three days off."**

Being extremely upset with this approach before even telling me just what it was I was being threatened with days off for, I turned around and started walking away. I stated as I departed, **"if you feel I have done something wrong Sgt. then I guess you will have to charge me, but telling those guys in the park to leave was perfectly within my right as a peace officer in this state."**

Sgt. Larson then responded, **"no it wasn't within your right. You get your ass back over here, I haven't dismissed you yet."** Needless to say, I never turned around and simply walked out and to my squad.

I then went down to the New Brighton police department (as I had a key for our station office there) and photo copied Minnesota Statute 299D and a peace officer right to threaten arrest. I gathered information from talking to Trooper Bonnell and others that the older man present with us that day was an aid to Senator Obestar. I wrote a long letter of my involvement that day at the Coon Rapids city park, including all those persons involved. My being accused by Sgt. Larson, how, where, etc. and the fact that he was sent by my Captain, (whom I was writing this to). I then slid this letter under the door of Captain Leo Foley in a manilla envelope that same evening.

Approximately another week or so went by and Trooper George Bonnell and myself both **received a Letter of Commendation.** I don't have the letter anymore but what I specifically recall (and Trooper Bonnell will also) is the way this letter was started out...**"You acted with the utmost restraint ...."**

(8.) Also in 1981, there was a situation where while stopping at the Anoka County dispatch center (as I, Trooper Jim Powell and many other routinely did to get d.l. checks, do paperwork etc.) a song was playing on the radio there and I told two dispatchers (Daryl and a blonde female) that the song "Rosanna" by the group "Toto", would be a number one hit one day. These two dispatchers bath disagreed with me, stating it was just too mellow or something to that nature.

Approximately a week later, the female dispatcher sent a switch message down to State Patrol dispatch indicating the following: **"Tell Trooper Lockhart that his information on Toto Rosanna was correct."**

Now keep in mind that I was never officially contacted by any State Patrol staff regarding this matter.

I learned, from the husband of the dispatcher, who was a contract tow operator for the State Patrol, that his wife was being "raked over the coals" because she told me I was right about the band Toto. I then made contact with Daryl who

further advised me that my Captain (Leo Foley) and under Sheriff (Dwyer) were good friends and that the comment was made by Captain Foley that this whole matter was a code of some sort between myself and the female dispatcher for getting together at a later time. That this type of thing was getting out of hand with (me) and my white women and that **"his black ass is going to hang on this one".**

I later learned, while speaking with the head of the M.C.I.U. (Major Crime Investigative Unit) for the County, that this female dispatcher was observed sitting in Mr. Dwyers office and being asked directly, **"What does Toto Rosanna mean? Tell us."** The female dispatcher would repeatedly reply that it was a band and a song, but she was not being believed. This M.C.I.U. person hearing the words "Toro Rosanna" apparently leaned into the open office of Mr. Dwyer and stated. **"Rosanna", yeah I just bought that album for my kid."**

I can't recall the female dispatchers name but I am sure Daryl will. Daryl has been a long time dispatcher for Anoka County S.O. There was also a State Patrol dispatcher (Barb Lutz) who received the message on the computer and apparently gave this info to Captain Foley.

This whole matter was then dropped, with a semi official apology given to the female dispatcher, however nothing ever being said to me.

(9.) In approximately 1984-1985, I became the Association Rep. for District 2900 here in Detroit Lakes. (no one else would put in for the job during this time)

Almost immediately I became involved in a situation with a Trooper named Ed Petroske. Trooper Petroske wanted to move to a location which was 8 miles outside the assigned station area. Trooper Petroske was having some severe personal problems at the time and I brought all of this information to the attention of the Executive Counsel for the Troopers Association and the Chief of the State Patrol at that time (I don't recall which chief as we were changing them

very fast during these years. Possibly Chief Kitteridge). What I do recall and what still troubles me even today when I think about it all, is that **I was not getting the serious attention needed to help Trooper Petroske, I believe simply because it was me asking.** It was during this administration (Ledding/Kitteridge) that I received the label, **"letter writing S.O.B."** but was never treated as a true representative of the organization. I asked for a platform for Trooper Petroske with the Chief but was only given a denial of his requests. Trooper Ed Petroske then committed suicide as a result of these many personal problems which were inclusive of the organizations lack of attention. It should be noted that this lack of attention continued even after Trooper Petroske's death in that the Chief would not attend his funeral and sent a Major (Major Gramse) in his place. The word through the grapevine was "Troopers don't kill themselves, so I am not going to honor this with my presence." I don't know what the actual or real reasons were for not being present, but I can assure you that one would be hard pressed to find a similar situation where the department head did not attend the employee's funeral.

(10.) In approximately 1988, I sent in a letter in regards to the State Patrol developing a department SRT (Special response Team) for critical incidents. This was similar to the suggestion made to Capt. Lenz in 1978.

In this letter, I made a detailed description of what the team could be made of in terms of member involvement and a two team placement both metro and outstate.

This matter is significant because it was the second time I had made this suggestion to the administration, with absolutely no response. To further the "no response" issue, a SRT team was formed shortly afterwards (which is still in place today) and even though I had originally made these suggestions, had some expertise in riot control, I was not asked, or included in anyway regarding the formation and development of such a unit.

(11.) In approximately 1992, during negotiations with the State Patrol and D.O.E.R. (department of employee relations) on contract renewal and wages. The statement was brought to the negotiation table **"if the state of the State becomes such that "lay-offs" would have to occur, then protected class employee's would be laid off last."** Basically that language.

I wrote several letters regarding this matter (later included in supporting documents) which gave little sensitivity to the protected class employee's already working. Specifically, I believe it was purposely "put out there" in an effort to shake up the organization, knowing that they were dealing with an almost all white male workforce and would generate department wide stress. ***(It should be noted that there is a history of not negotiating in good faith by state negotiator's/the necessity to go to arbitration on more than one period. Therefore this type of action should not be viewed as unrealistic under all the circumstances which were present: Labor issues/discriminatory atmosphere/etc.)*** What in fact this statement did (which was publicized in the association news letter) was help to create more of the very discrimination this department has publicly stated it is determined to eliminate. **The aftermath were numerous comments made to me and others regarding one's employment staying secure if they were of the fried chicken persuasion, etc. etc.** Obvious division and hatred re-fueled in an already color discriminatory organization.

When making complaint about this matter, I later received a call at home from (then) Deputy Commissioner Carlquist who stated almost immediately to me, **"Mel, this is an effort to try and help you people".**

I had outlined exactly what the problem was in relation to unnecessary stress put on the minority employee as a result of this proposed language and Commissioner Carlquist "still" could not get it. Or simply refused to get it! His response letter to me (copy in later supportive documents) never addressed my basic complaint here that this type of language

and proposal should have been screened with at least a little sensitivity to the few minority employees in the work force.
(12.) In approximately 1993 Chief Chabries departmentally mandated that **"no Troopers be involved with multi jurisdictional tactical units".** This action most directly effecting my participation with such a unit in northern Minnesota.

The reason learned (never formally given) was that Troopers should be concentrating their time and efforts on our job of traffic law enforcement. This prohibition however was given to tactical unit Troopers (of which I was the only truly active one in the state), not other Troopers who actually worked for other police agencies and other security agencies of law enforcement relation. I feel that I was singled out with a blanket prohibition to such law enforcement participation, specifically because of my color.

I spoke briefly with Chief Chabries during the time of his decision and (as the road Troopers intuition tells him when he perhaps should not walk up to a particular vehicle because of atmosphere and circumstances to the stop) my intuition was telling me that Chief Chabries may. have been acting out of discrimination on this matter. (I later, 1996-1997, confirmed this feeling/intuition by experiencing additional actions by Chief Chabries on a recruiting matter)

My participation with this tactical unit (Wadena County E.R.U. emergency response unit) was on my off time and never interfered with State Patrol matters. In fact, the original authority given to participate was based on such guidelines, (see supporting documentation). It was departmentally agreed that I would receive limited compensation for such participation.

While a member of the Wadena County E.R.U. numerous call outs of critical situations involved my participation. I received numerous commendations from the Wadena Sheriff and know of at least two letters which were sent to State Patrol Central office on my behalf. At the time of this

participation, I was the only Minnesota State Patrol Trooper who had successfully completed H&K (Heckler and Koch) MP-5 automatic weapons training in Washington D.C.. I was also the only Minnesota Trooper who had gone through the U.S. Army's extensive Counter Narcotics course. This training and this E.R.U. participation, all grooming elements for similar Minnesota State Patrol utilization, current or future considerations. Chief Chabries I believed, recognized such expertise and involvement being acquired by myself and eliminated any possible advancement along these avenues for me.

*****It should be noted that Trooper Scott McAllen also has knowledge of this matter with Chief Chabries and specifically comments made about me out of my presence regarding a large photo of me at the State Patrol training center and Chief Chabrie's displeasure with it.*****

(13.) In approximately 1995-1996, I sent a letter to Commissioner Michael Jordan after having a conversation with a doer employee at a State Patrol in-service training session. (See copy in supporting documents)

I basically advised Commissioner Jordan that I would no longer participate in any Minnesota State Patrol recruiting efforts as a direct result of the lack of involvement by this agency. I supported this lack of involvement by the reality that **almost twenty years had gone by with the State Patrol never officially involving me in a (agency initiated) recruiting effort.** (The State Patrol didn't have any official recruiting effort for minorities)

Commissioner Jordan then asked that I not "give up the ship" and that he was committed to seeing this reality turn around. (Commissioner Jordan was black)

Some months passed and I was contacted by (then) Major Anne Beers and (then) Personnel director Delinda Hasty. Things seemed to be moving very positively for the first time in twenty years regarding minority recruitment in the State Patrol. I was directly involved in several efforts at the St.

Paul Martin Luther King Center, Central High School and University of Minn. At one point it was learned that several persons of color (African American college students interested in law enforcement) were available to be recruited in the State of Illinois. Arrangements were made with Delinda Hasty and Personnel to fly me down to Illinois and start the recruitment process.

Chief Chabries then made the statement to me that **"we have plenty of these people in the process already".** The State Patrol wasn't going to spend the $630.00 it would cost to have me, **"a uniformed black representative of the Minnesota State Patrol",** go down and initiate a recruiting effort. This statement coming after Chief Chabries tells Delinda Hasty that this would be a viable effort on the departments behalf.

Delinda Hasty, in conversations before and after this incident, repeatedly informed me of the definite disparity in minority applicants and the potential for such applicants. Delinda Hasty further stated that these same comments had been repeatedly made to Chief Chabries.

Commissioner Michael Jordan was then. systematically removed from office as a result of a claim by Chief Chabries and others, that Commissioner Jordan did not report a threat of attack on the Governor, to the Governor. This reported dereliction was accompanied by several other alleged minor infractions.

Commissioner Jordan was almost immediately disliked by the State Patrol work force with comments made to me in relation to his requirement that we **"think of the public as our customers",** being ridiculous. Comments by other white male Troopers to white male Troopers were not as policy related but specifically racially based in statement, (supporting documentation to follow).

(14.) In the spring of 1997, while standing in the Detroit Lakes State Patrol radio room, I monitored a transmission by Trooper Darrell Sanderson to dispatch as follows; **"you can**

about guess what color he is with a name like that." Communications operator R. Fritz was on the consol and rolled his eyes to me as Trooper Sanderson was making the statement.

I brought this matter to the attention of Capt. Peter Gibson a few moments later. Copt. Gibson shook his head in disbelief and stated, throwing his hands in the air, **"you handle it. What can I do?"**

Approximately a day or so later I spoke with Trooper Sanderson on the phone, advising him that I had heard his comment and asked him directly **"why say something like that?"** His response to was, **"what's the big deal? You mean I can't make a comment like that either?"** (either being the key element here) I then advised him that it was not a necessary thing to relate to Fritz besides it being a racially negative statement and over a system monitored by thousands of people. Trooper Sanderson just said "oh", and our conversation was over.

(15.) In approximately 1997-1998, I was contacted by Chief Anne Beers and Captain Al Smith of State Patrol Training to be the coordinator for a Minnesota State Patrol recruitment effort. This coordination would specifically relate to the spending of $150,000.00 appropriated by the legislature for females and minorities.

Having some reluctance in that I felt I was being asked at this time because of my prior written and verbal disapproval regarding department commitment, I agreed to put together a team.

I was advised initially that I could select my team members. I then did so, paying close attention to selecting a representative from each gender and ethic group. These were people whom I had previous dealings with and knowledge of their on-going efforts to promote diversity within the State Patrol.

At the first meeting I then became aware of other persons, not previously indicated to me, which were present

as members of a team I was asked to form. Specifically Lt. Lori Hodapp (which I had no initial reservations about relating to any factual basis) who in my estimation was present as an undermining force to the entire program.

To not go over this same ground again, (as this particular compliant is a follow-up to a letter you already have) I will conclude here by stating that the totality of things has caused me to no longer participate in this recruitment process. (See related letter in accompanying documentation)

(16.) Another issue which I have not to date been able to get a clear answer on is the Trooper Rodriguez/Trooper Teigen matters.

In both of these cases, the Trooper was alleged to have committed a crime in addition to a department charge of "conduct unbecoming". In the Tegin case, Trooper Teigen was found guilty of a DWI offense **(the main goal objective in State Patrol traffic law enforcement)** and received a few months off in regards to the conduct unbecoming, department action.

In the case of Trooper Rodriguez, a finding of no guilt was the criminal outcome of a alleged Rape charge and there was a time period of over 10 months received in relation to department action. (I have some additional information that the State would not even give Trooper Rodriguez's attorney a platform to discuss this issue)

One matter is definitely criminal and an offense of a life threatening nature. The other is a moral conduct issue at the most, yet such non consistent punishments occur?

Could these matters be related to the fact that (former) Chief Chabries was the State Patrol Chief at the time?

*****For the record, I support neither of these Troopers in their actions of discredit to the organization. I only question the issue of fair and equal treatment and the fact that one of them was Hispanic.*****

When considering the wide span of participation in the atmosphere of discrimination. Commissioners, Chiefs,

Captains, Lieutenants, Sergeants, D.O.E.R. and even BCA supervision. It is no wonder that the front line employee, "Troopers" have maintained such a constant inverse attitude toward the integration of the ranks. How could anything change below without a commitment to change on top?

The color issue is just coming to light now, but the matter has already reared it's ugly head on several occasions with female harassment in this organization. Preface both of these with a history of "inconsistent shotgun effect, double standard, general employee harassment" and one can begin to see the serious problems even yet to be revealed.

In my blind dedication to this organization. In an equally blind hope of future accomplishment, in "fair and equal" treatment. To strive for change continually by representation, participation and constructive criticism. Believing falsely that things should and can be handled "in house", thereby not even considering an early on address to these matters from the litigative field. The results have left me choking in the same atmosphere of 22 years ago.

What has changed is that the color prejudice takes on a new form. More systematic, not as blatant, yet non the less powerful.

I am now convinced that this agenda is always underlying and organized. I believe it is unfortunately a cancer in law enforcement nation wide. Were it not so, things like the Troopers Association voting to send L.A.P.D. a vote of confidence after the O.J. Simpson trial, wouldn't exist...Think about that? L.A.P.D., a nation leader in discriminatory practices for years. Little changing from my Marine Corps days as an M.P. out there, to now. Yet this organization would over look obvious problems with the O.J. Simpson trial and focus on the end point only of his guilt? (Which I believe also should have been the verdict) But to feel it organizationally necessary to send a vote of confidence? With so many other areas that effort and energy could have been channeled to?

I recall when the news media flashed the video of the deputies beating the Hispanics in the pick-up truck. The comments then were, **"the only thing they did wrong was get on tape".** And then listening to our people side with again, L.A.P.D. in that the six officers were following procedure when they kept hitting Rodney King. **Because "you could clearly see he was trying to get up."** I'm sorry, something is terribly wrong here! We justify and attempt to, in support justify, the obvious short comings of other departments "adrenalin effect" getting out of hand ....

22 years in this organization and I can only recall one training session that even remotely related to cultural diversity and gender sensitivity? Only one! This should be an on-going thing with any police work.

Being involved in the hiring process (on occasion) in oral boards and backgrounds, I noticed we have only <u>one</u> question to screen for such prejudices. The question actually just states whether the applicant has displayed any prejudice or bias? Now how general can you be? First of all, who is going to answer yes to one basic question? No wonder there is evidence of color and gender prejudice slipping through the system.

Even the 1998 State Patrol rookie school and the incident where a African-Native candidate had to listen to Native American jokes while in a van heading for a training session. This conduct coming shortly after the Equal Opportunity representative (Bob King) had gone over the cautions and prohibitions to such actions and remarks. Yet because of our organizational lack in commitment, our lack in serious attention to eliminating these attitudes in law enforcement, this still goes on. More than likely, those (now troopers) candidates in error, will reveal that prejudice when dealing with their first Native American "bad guy" that causes them a problem. As a matter of fact, I recall that one of those candidates was previously a police officer in an area which dealt with some frequency, Native Americans.

The information I have given you here is detailed in some forms and general in others. In every case however, there is a avenue to further clarify what I have said.

Sincerely,

Mel Lockhart
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218-564-5295

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC SAFETY

June 9, 1998

Captain Al Smith
Director Of Training
Minnesota State Patrol
Training Academy
1900 W. Co. Road I
Shoreview, Minnesota 55126

Captain Smith,

I regret to inform you that I have made a decision to no longer participate in the Minnesota State Patrol "Minority Hiring and Recruitment" process.

This decision comes as a result of continued obstacles to the effort of specifically attracting and hiring "persons of color" with the Minnesota State Patrol. The most recent of these obstacles being the realization that Lt. Lori Hodapp will continue to undermine such an effort, and do so under the "guise" of protection for the white male work force.

I use the word "guise" to describe what I feel is an on-going effort of "systematic prejudice" perpetrated by certain individuals within the State Patrol organization. I believe this is an effort which has been with us since the first females and persons of color were hired 22 years ago and I now believe that Lt. Hodapp is one of those individuals.

You have been at the three meetings she has attended just like I Captain. Her presence has been disruptive in the area of making sure everyone attending knows that, although the committee was formulated as a result of a legislative mandate and money appropriated for females and persons of color, she was also fighting for and being representative of the white male work force. She detailed and clarified her position by

stating that "the committee should not be a part of doing something illegal" by following to the letter the legislative mandate. At the last meeting she passed out a news article written by a person of color and seemingly negative to the affirmative action effort, in an effort to "drive her point home" with regards to eliminating the white male prospect from our considerations involving the appropriated money and legislative mandate. She then concluded at the meeting close with the comment that if she thought for a second that this recruitment and hiring effort was being discriminatory to the white male, that she would immediately and abruptly remove herself from our committee. Actually I took this as a threat to see it her way or else kiss her participation good-bye. I remember speaking with the other persons of color while at lunch that day, who also took the comment this way.

Unless there is something I am not aware of, the Minnesota State Patrol has always been, remains, and probably will always be predominantly a white male work force. The hiring process has reflected this with every single rookie school conducted. Again, unless there is something I am not aware of, when has the white male employee suffered in relation to representation and the Minnesota State Patrol hiring process? When has he ever even come close? So the obvious question here is what exactly is Lt. Lori Hodapp protecting and being so caucious about? What disparity exists for these persons in comparison?

I say again and contend that this type of negative involvement is a direct result of the systematic prejudice issue. This is 1998. We can't be as blatant as prior times. So, what has never left, (the prejudice itself), must take on a new form to get the goal accomplished of "minimizing" the color effect to long standing predominantly white organizations.

When we needed females in the work force, granted, there was a much larger pool to pick from, yet not one hesitation existed (by recruiting done and numbers hired) in

effecting a very direct and "hasty" action to "forcing" a representation in our work force.

As soon as, or whenever the effort has been directed toward the persons of color, (specifically in law enforcement agencies), barriers, obstacles, systematic red tape, systematic prejudice prevails. This was never more evident as when former Chief Chabries refused to spend $650.00 on a Illinois trip of "color recruiting".

A few years back, I wrote commissioner Jordan on this very same subject of eliminating myself from the "minority effort" after experiencing years of nothing being done. He asked me to please reconsider for the betterment of the organization and that something would get done. Shortly after that, the Patrol involved me (for the first non-self initiated time) in several recruiting efforts. I worked closely with personnel director Delinda Hasty and it was up until the matter with Chief Chabries and the systematic removal of Commissioner Jordan, that something actually looked as if it were going to be done. (There's that word again, systematic!)

Well we all know that effort died and here we are again. Mainly because the legislature provided specific and directed money. The problem is, I'm not willing to keep fighting the fight anymore. My health is directly effected now because of it all and quite frankly I probably won't be working anymore come this winter. The doctors tell me that I should steer away from two main things, lung exposure to cold and unnecessary emotional stress. Captain, I am at the point of unnecessary. I don't need this and I certainly don't need to keep sitting by and watching us miss windows of opportunity.

Burn out? I suppose you could call it that too. I choose to think of it as simply tired of fighting for something so very basic to life itself...REPRESENTATION. Just the clear opportunity to have such.

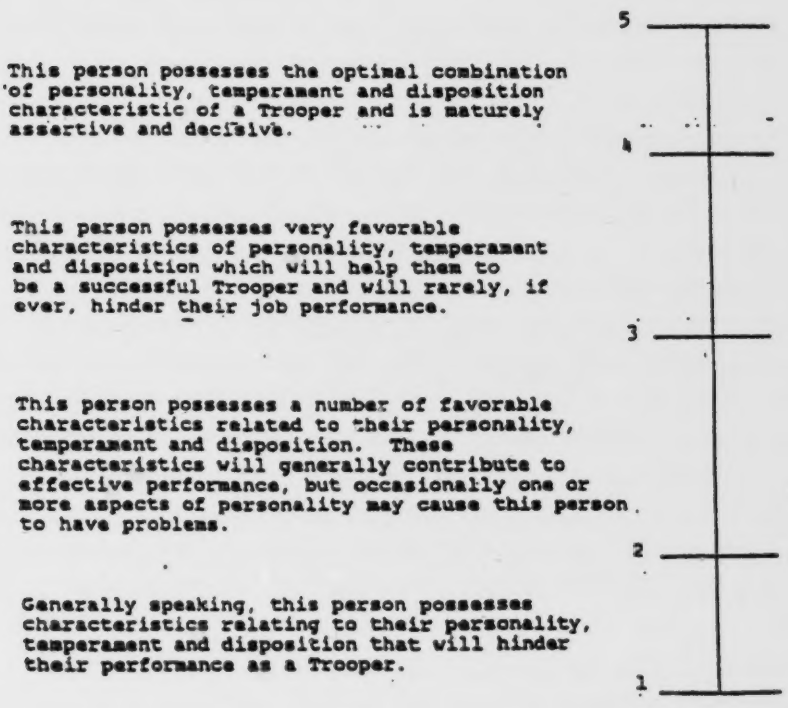
Sincerely,

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Detroit Lakes, Minnesota 56502
218-846-0782

CATEGORY #1:

PERSONAL CHARACTERISTICS

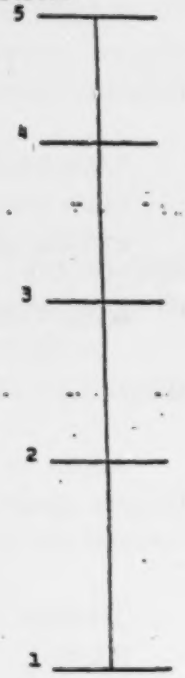
The Probationary Trooper possesses the following characteristics relating to personality, temperament, and disposition; assertiveness, diplomacy, tactfulness, integrity, dedication, conscientiousness, objectivity, emotional stability, and sensitivity and concern for others. He/she possesses *those qualities necessary to work and get along well with fellow employees.*



CATEGORY #7:

COMMUNICATION AND INTERPERSONAL SKILLS

Ability to communicate orally, get along with others (Human Relations); deal effectively with the public; to withstand constructive criticism; and work under pressure or stress.



5 This person has an outstanding ability in communicating with and getting along with others. They are excellent in dealing effectively with the public and is readily able to withstand constructive criticism.

4 This person expresses themself well before a group or on one-to-one. They are cooperative and courteous and gets along well with others. They are able to work well under stress.

3 This person generally expresses themself well before a group or on one-to-one. They generally get along well with others and generally deals effectively with the public. They usually are able to work well under stress.

2 This person has difficulty in expressing themself well before a group or on one-to-one. The general public does have difficulty in understanding them and/or at times is not able to work well in stressful situations. A lack of courtesy is evident in their dealing with violators.

* * *

REQUEST FOR ADMISSION NO. 35.:

Admit or deny that the FTO Biweekly Summary for Bogren completed on March 20, 1995, by FTO Brian Polansky contains the statement:

> "Ann has a very nice personality and gets along well with other partners and myself. She is caring to other's needs and friendly in her actions with motorists."

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 36.:

Admit or deny that the FTO Biweekly Summary for Bogren completed on March 20, 1995, by FTO Miller contains the statement:

> "Trooper Bogren takes instruction well and has been learning from previous mistakes. Trooper Bogren demonstrated a "take charge" attitude when dealing with intoxicants and demonstrates a tolerant attitude throughout the DWI process. Trooper Bogren appears to genuinely enjoy her job."

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 37.:

Admit or deny that the FTO Biweekly summary completed for Bogren on April 16, 1995, by FTO Waxberg contains the statement:

"Trp Bogren was receptive to training & ideas that were different from others she had received. When she was instructed to do tasks differently for safety of troopers, or just ease, she would do the task as instructed. She is willing to listen and learn. She then attempts to do the task as instructed."

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 38.:

Admit or deny that prior to November 11, 1995, Plaintiff Bogren was never formally counseled or admonished by the State Patrol for any alleged inability to manage anger.

RESPONSE: Admit.

* * *

communicated to plaintiff, and identify all documents that relate or refer to, or that support each reason.

ANSWER: Plaintiff Bogren's probationary appointment as a State Trooper was non-certified due, in part, to a criminal damage to property charge against the plaintiff by a municipal police officer. Further support for her termination is provided by her substandard performance during her probationary period. Plaintiff Bogren was also noted as being evasive, uncooperative and dishonest during the internal affairs investigation into the criminal charge against her. Finally, as an at-will, probationary employee, plaintiff was subject to dismissal for any reason or no reason at all.

INTERROGATORY NO. 2.:

Identify each person who, in any way, participated in the decision to terminate the plaintiff's employment with the defendant State Patrol and describe with specificity each such person's role in the decision-making process.

ANSWER: Col. Michael Chabries, Chief of the Minnesota State Patrol and Commissioner Michael Jordan had the sole authority to non-certify Bogren's probationary appointment. Assistant Commissioner Donald Davis, Lt. Col. Steven Mengelkoch, Lt. Lori Hodapp, and Lt. Thomas Fraser were among those who participated in discussions regarding Bogren's termination. The State reserves the right to update this response.

INTERROGATORY NO. 3.:

State whether any oral or written warnings or other discipline were issued to the plaintiff concerning any matter relating to the reason(s) for the plaintiff's termination. If yes, state the date, person(s) present and circumstances pertaining to such warnings and attach hereto copies of any records reflecting these warnings.

ANSWER: Supervisory members of the Minnesota State Patrol were dissatisfied with Plaintiff's progress in several areas including her driving ability, her anger management, and the circumstances surrounding her criminal damage to property charge.

INTERROGATORY NO. 4.:

If, prior to November 11, 1995, the plaintiff was ever censured or disciplined by the defendant, in any fashion for any alleged infraction of the defendant's rules or regulations or for any alleged inadequacy of performance, describe all such instances of censure, stating the name, title and job description of all persons who censured the plaintiff and the dates of same.

ANSWER: See answer to interrogatory No. 3 above.

INTERROGATORY NO. 5.:

State with specificity each of the "number of incidents involving conflict between Bogren and Trooper Brian Polansky..." which involved "her driving behavior and the corrective action taken by Trooper Polansky toward Bogren..." as described in the Supervisors Report of Probationary Trooper for Trooper Ann Bogren, dated November 11, 1995. For each such instance of driving

behavior requiring corrective action, state the underlying law, rule, general order or policy that is the basis for the corrective action.

ANSWER: State Defendant cites the following incidents: On 3/16/95 Trp. Polansky notes that Bogren went through a red metered light; on 4/22/95 Polansky notes that Bogren, with a citizen in the back of the squad, cut-off another vehicle; on 5/1/95 Bogren ran a stop sign and claimed she didn't see it; on 5/2/95 Bogren again went through a red metering light and claimed that she did not know it was red; on 5/2/95 Bogren drove over the center line while operating the MDT, and on 5/2/95 Polansky; while at a motor vehicle accident reminded, Bogren that she needed to call a tow as one of the individuals did not have insurance. Also, see document identified as Bogren 2802 - Bogren 2803, previously produced. Defendants reserve the right to a supplement this response.

INTERROGATORY NO. 6.:

State with specificity each and every false statement defendant State Patrol alleges plaintiff made during her employment including during the defendants' internal affairs investigation of her. Further state the factual basis for the assertion that each statement is false.

ANSWER: Plaintiff was dishonest when she initially declined, during her internal affairs interview, that she had received counseling to help her control her anger. Her attorney, Joe Marshall, requested a break so that he could take Bogren out of the room.

DRILL INSTRUCTOR'S DAILY LOG

Date 11-16-94

Drill Instructor(s) Chuck Walters

Outstanding Performances- Cadet Bogan - outstanding driving skills, as reported by driving school instructors
Cadet Cassidy - same as above
"There is nothing we need to teach these two Cadets"

Substandard Performances- Cadet Zofka, last day as class leader, but class lets her Briefs, also failed to impress with leadership skills, always seems flustered. Does appear to be listening a little better.

Absent-(name and reason) Cadet Bowles - resigned from pr

Injuries-(name and type) (first report of injury)
Cadet Pavon, foot injury, soreness, Cadet Feigen, continued pain or injury

Critical Incident Report-(name) N/A

BEST AVAILABLE COPY

DRILL INSTRUCTOR'S DAILY LOG

Date 11-16-94

Drill Instructor(s) WILSON

Outstanding Performances- Comenskey at Drive
Bogren Evening

Substandard Performances- Comenskey - marching

Absent-(name and reason)

Injuries-(name and type)(first report of injury)
SPEAR, FEIGUM, HORVATH

Critical Incident Report-(name)

State of Minnesota
Department of Public Safety
INTERNAL AFFAIRS DIVISION

SYNOPSIS

IAD CASE # 95-048

DATE: 09-11-95

BY: Lt. David J. Graham 2506

COMPLAINT(S): Robert J. Hintzke
9209 S. 44th St.
Franklin, Wisc. 53132

EMPLOYEE(S) NAMED:
Trp. John Goad #240

REPORTED INCIDENT(S): Rude behavior

INVESTIGATION: On 07-11-95 at 1817 hours, Trp. Goad issued a citation to Hintzke for an illegal U-turn on Hwy 101 by CR 18 in Scott County. Hintzke alleges that Goad was rude to him and a citation should not have been issued, due to the fact that he did not know he could not make a U-turn in that area.

I took a taped statement over the phone on 09-02 from Hintzke and he admits that Goad did not ever use foul or abusive language towards him. He does state he stepped out of his car and was ordered back in by Goad and then asked for registration and proof of insurance. He feels he was made to feel like a "common criminal". When he was told over the phone that I would not get into the ticket itself, and was just investigating the conduct by the Trooper he became upset

with me. I told him the court system was the only way that the citation could be dismissed or him found not guilty.

Trp. Goad remembers the stop and citation written to Hintzke. He states he treated no differently than any other traffic stops that he makes.

CONCLUSION:

Trp. Goad has very good interpersonal skills and has always treated people fairly and with respect. He told Hintzke to get back in his car for his own safety and also Hintzke's safety standing along the roadway and this was explained to him once he was back in his squad. Once it became apparent to Goad that the conversation was going no where he terminated the conversation with instructions how to take care of the citation.

I believe that Hintzke's sole purpose in writting the letter was in hopes of getting the citation dismissed. I can find no evidence to support the claim that Trp. Goad was rude.

State of Minnesota
Department of Public Safety
INTERNAL AFFAIRS DIVISION

SYNOPSIS

IAD CASE # 95-014

DATE: 4-17-95

BY: Lt. Al Kutz P852

COMPLAINT(S): Laura Dvorak

EMPLOYEE(S) NAMED: Trooper Beth Zeller SP170

REPORTED INCIDENT(S): Abusive, aggressive behavior

INVESTIGATION: The investigation of this case took longer than expected because Coya Artichoker was out of town for one week. I took a taped statement over the phone from Laura Dvorak on 3-20-95. Coya Artichokers statement was taken in the same manner on 4-5-95. With Trooper Zeller was her Association Delegate, Trooper Chuck Walerius, during her taped statement taken in the 2500 D/0 on 4-10-95. Trooper Zeller read and signed the Garrity Advisory and was witnessed and signed by myself and Trooper Walerius.

CONCLUSION: This case did not involve profane language, obscenities, or physical abuse. Laura Dvorak and Coya

Artichoker made their complaint together, not independently. An ICR was submitted by Trooper Zeller at the time of the arrest (this has been included). Upon reading the ICR, I could tell that this was not a "routine" stop, as there was a clash of personalities. Although not routine, neither was it a disaster either. Looking at the stop, I could not find evidence that the accusations made by Dvorak did or did not occur. I tend to believe that they did not based on my knowledge of Trooper Zeller, but that is taking my opinion into the matter. In conclusion, looking at the evidence given, I cannot prove or disprove misconduct. Therefore I am classifying the matter as not sustained.

State of Minnesota
Department of Public Safety
INTERNAL AFFAIRS DIVISION

SYNOPSIS

IAD CASE # 95-065

DATE: 11-20-95

BY: Lt. David J. Graham 2506

COMPLAINT(S): Richard F . Schmidt

EMPLOYEE(S) NAMED: Trp. Dean Grothem #154

REPORTED INCIDENT(S): Unprofessional behavior

INVESTIGATION: I was unable to speak with the complainant who did not leave a call back number. In interviewing SP 154 I find his version of the incident to be honest and believable. He remembers the incident and speaking with the complainant. He states the complainant was not wearing his seatbelt at the time of the stop and observed him trying to buckle it up as he was stopping. The vehicle was clocked on laser radar by Sgt. Sutherland who also noticed the subject was not wearing seatbelt. Grothem states the subject had the seatbelt under his arm when he walked up and spoke with him. He denies ever touching the complainant and in fact has a personal policy to not do that to anyone he stops unless it is a physical arrest.

CONCLUSION: Based on prior contact with Grothem and observing his work and deal with violators, I find his version of the incident much more credible.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Ann Bogren. Civil File No. 98-880 PAM/JGL

Plaintiff,

vs. **AFFIDAVIT OF MICHAEL CHABRIES**

The State of Minnesota; Department of Public Safety, Donald Davis, Commissioner of the Department of Public Safety, in his official capacity; Minnesota State Patrol; Ann Beers, Chief of the State Patrol, in her official capacity; Lieutenant Thomas Fraser of the State Patrol, personally and individually;

Lieutenant Lori Hodapp of the State Patrol, personally and individually; and

Lieutenant Colonel Stephen Mengelkoch of the State Patrol, personally and individually.

Defendants.

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

MICHAEL CHABRIES, being first duly sworn, deposes and states as follows:

1. My name is Michael Chabries. From July 1993 to September 1997, I was Chief of the Minnesota State Patrol.

2. As Chief of the State Patrol, I have the ultimate authority for terminating members of the State Patrol.

3. I made the final decision to terminate Ann Bogren. Based upon reports from and conversations with her supervisors, Lts. Hodapp and Fraser and Captain Mengelkoch, I determined that it would be better for the State Patrol and the citizenry if Bogren left the Patrol.

4. I based my conclusion on the following factors:

   a) Bogren was a probationary Trooper;

   b) in the immediate past, Bogren had been involved in a potentially criminal matter involving an ex-boyfriend. This was the event which triggered her discharge;

   c) After the incident, her ex-boyfriend reported to the Patrol that several times she had told him, "Wait until I have a year and a day on, these people will know who I am then"-- or words to that effect.

   d) She had driving problems during her probationary period; and

   e) I had some concerns about her accountability. In the internal affairs investigation of the incident with her former boyfriend she was less than forthcoming about the facts and about seeking help for anger-management. In addition, there was a question involving one of her automobile accidents and whether she intended to file a report.

The last four factors demonstrated to me that I could not risk her to be a sound Trooper in the future.

5. I want to expand upon these factors. With respect to probationary status, I apply a different standard with respect to discipline between probationary and certified Troopers. First, the collective bargaining contract provides that a certified Trooper is entitled to a just-cause hearing. Consequently, when dealing with a certified Trooper, I must consider whether my reasons for discipline can be sustained in a hearing. With a probationary Trooper, I have no such concern. Second, probationary Troopers are aware from their Academy days that they must be on their best behavior during the first year. They are told this repeatedly by instructors and their supervisors. They are also told that activities in their personal life could be considered by the Patrol. Consequently, when a Trooper shows bad judgment or manifests other problematic conduct during their first year, I am aware that it will likely get worse once they are certified and no longer on their best behavior. Third, certified Troopers may have a countervailing history of exemplary performance which I can weigh against their current problems. Probationary Troopers have no such history.

6. I was especially concerned about the former boyfriend's allegation that Bogren had several times made the statement, "Wait until I have a year and a day on, these people will who I am then." That statement strongly implied to me that she would be a management problem for her supervisors.

7. My concerns about her accountability involve the unique circumstances of a State Trooper. Troopers typically work on their own with little or no active, hands-on supervision. Therefore, a Trooper must be forthcoming about problems or incidents in the field. I was concerned that Bogren would not be accountable in the future.

8. I have read Plaintiff's Memorandum in which she claims that Lts. Fraser and Hodapp lied in their supervisor's report in which Bogren's termination was recommended. I have never had any reason to think that either individual was

anything less than honest with respect to the Bogren report or any other matter.

9. In Plaintiff's Memorandum, she identifies a number of male troopers whom she believes were treated in a more favorable manner than she was. I would like to make some statements with regard to each of these male troopers.

10. First of all, I had no involvement with the following individuals and their situations as I was not part of the State Patrol organization: Cheryl Turner, George Bonnell, Terrance Marshall, Ken Drevnick, and Dominic DiIoia.

11. I was Chief of the Patrol during the incidents involving Bruce Brynell, Gary Pierce, Eugene Pollard, Francisco Rodriguez, Pete Teigen, and was involved in the conclusion of the David Peterson situation.

12. As Chief of the Patrol, I recommended the following with regard to each of the above individuals:

a) I ordered the internal affairs division to investigate the conduct of Bruce Brynell. In the Settlement and Release Agreement, I was involved with staying the imposition of his suspension if he was not convicted of domestic assault and if he completed an anger management counseling program.

b) With regard to Gary Pierce, I ordered the internal affairs division to investigate his conduct. I recall that Pierce received a written reprimand.

c) Concerning the conduct of Eugene Pollard, I placed him on investigatory leave while the internal affairs division conducted the investigation. At the conclusion of the investigation, I terminated Pollard.

d) With respect to the conduct engaged in by Francisco Rodriguez, I also placed him on investigatory leave pending the internal affairs investigation. At the conclusion of the investigation, I terminated Rodriguez. The State Patrol Troopers Association took this matter to arbitration, and the arbitrator reduced the termination to a 10 month suspension without pay or benefits.

e) In the Peter Teigen situation, I placed Teigen on investigatory suspension while internal affairs conducted the investigation. Upon receiving the findings of the investigation, I terminated Teigen. Teigen appealed his termination, and was reinstated.

f) When the David Peterson situation first came about, I was not involved as I was not the Chief of the Patrol at that time.

13. To the best of my recollection, I had no involvement with Eric Clausen, Michael Connelly, Dean Grothem, John Korth, Mark Kincade, or Tim Peterson as they were all probationary employees assigned to Districts in which they were supervised by lieutenants and the District Captain. The only time that I would become involved with a probationary employee is when an issue was brought to my attention by the District Captain.

14. With regard to Dana Horwath, I recall that I reviewed her background investigation during the selection process. I disregarded the comments in this report by Trooper Drevnick regarding the time that Ms. Horwath spent in the State Patrol's High School Explorer Program. I personally intervened during the selection process and said that I was going to hire her as a probationary employee.

15. Since Ms. Bogren was a probationary trooper and not certified, I did not and would not compare her with a certified Trooper in terms of handling disciplinary matters.

16. To the best of my recollection, Ms. Bogren did not grieve her discharge.

FURTHER AFFIANT SAYETH NOT.

s/_____
MICHAEL CHABRIES

Subscribed and sworn to
before me this __2__ day of

July __, 1999.

s/ Gary Gatherum
Notary Public

* * *

2. Other probationary troopers were not treated differently.

While Bogren does identify several probationary troopers who were not terminated, she fails to establish any basis for a conclusion that their conduct was comparable to hers. The conduct of probationers identified can be described as over-zealousness or irresponsibility. For example, Bogren identifies probationary Troopers Grothem, Korth and Peterson who reacted strongly to citizens while on duty. These are "teachable" concerns. Bogren's conduct showed attitude problems which must be considered more endemic.

Moreover, her argument fails to connect decisions involving these troopers with her decision-maker, Chief Chabries. That is, if Chabries had no decision making role for the identified comparators, there can be no inference of disparate treatment. In *Gill,* this Court concluded that the focus must be on the decision-maker for the question of actual reasons for adverse action. For the same reasons the focus must be on the decision-maker for pretext. Thus, in the absence of proof that Bogren's decision-maker had any role for evaluating the probationary trooper identified by Bogren, they are not similarly-situated with her.

Finally, the State has successfully showed that probationary troopers were terminated for conduct less troublesome than Bogren's. For example, Probationary Trooper Robert Starzl was non-certified because he criticized the Patrol at a fishing contest dinner where members of other law enforcement entities were present. Beers Aff. at ¶ 8, Apl.-A 123. Another example of this is Probationary Trooper David Hutchins. The culminating event for Hutchins' termination was his utilization of a paper clip as a tie bar. Indeed, Bogren's argument that Hutchins was discharged

weighs against her argument that she was treated differently. *Id.*, at ¶ 7, Apl.-A 122.

* * *

Notes by Darlene Porter of 3/10/97 interview conducted onsite in the presence of Kristin Jones Pierre, Assistant Attorney General, and Kristin Van Arnem, Legal Assistant with witness:

GARY F. PEPER
LIEUTENANT & ASSISTANT COMMANDER
DISTRICT 2500
(612) 591-4680

Peper provided the following information:

Peper is the Assistant Commander when Captain Steve Mengelkoch is away and is retiring in 6 months.

Peper is in charge of support to the officers in the field so his contact with CP is in regard to the equipment she uses in the field.

CP has a squad car which is one of the pieces of equipment issued to her for use on the job and she also take it home with her.

In "rookie school," or Academy Training, the newly hired Trooper receives the instructions as to the procedures to used to report an accident and when to do so. All Probationary Troopers have completed this training and know the rules on accident reporting in regard to their squad car. Peper does not go over this with them because he does not need to do so.

Peper saw CP coming and going whenever CP was in the office but not on a daily basis.

Accident at the Intersection:

Peper recalls that CP had one accident at an intersection when she went through a red light. Peper went to the scene of this accident but other Troopers wrote up the accident report. CP had gone through a red light and was hit by another vehicle. Peper does not know who was at fault.

Any accident is reviewed by a board and the supervisor will go over the board's decision and the accident situation with the Trooper who was involved.

Peper has no contact with the review board and does not know the results unless Captain Mengelkoch is on vacation.

Meter Accident:

The meter accident came to Peper at the office as to what had happened. Peper told CP that no one has been discharged for having an accident. A few years ago R had a special project team and he had an accident.

Peper looked at CP's squad car from the meter accident and saw no damage to the vehicle, just a scrap on her bumper. She had not reported the accident but later admitted that she had hit the traffic device. CP said she slid and went into the meter.

OTHER REPORTS:

Peper recalls that later there were two reports completed by CP that needed some additional information. Peper does not recall specifically what was missing but it was minor. Reporting procedures at R are a learning process. Peper is the one who has to be sure that reports are timely to the public.

The meter light required maintenance crews to fix it so an accident report was needed even if there was not damage to the vehicle.

RUMORS:

Peper heard rumors that CP told her fellow troopers that she was going to make it through probation then leave but get even with a few people when she did. Peper passed these rumors on to the Lieutenant when Peper heard them.

After her discharge, Peper and other supervisors heard more from her Academy class but had heard nothing till her discharge as when you go through the Academy the class is tight, loyal to each other.

TURNED IN HER EQUIPMENT:

CP turned her equipment in to Peper after her discharge but asked Peper to meet her at a Minnesota Department of Transportation location instead of coming in to the station as one usually does. Peper thought this was a strange request but agreed to meet her as she requested. She was there and turned it in properly.

INTEGRITY:

Peper was unable to address the question as to whether there ways a lack of integrity to any of her reports. Peper does not review the reports as that is the Lieutenants job.

UNKNOWN DAMAGE

In one situation, unknown damage occurred to her squad car. The report was that she came in to the station.

Peper has 80 squad cars in his District. and cannot recall details as to how many may have unknown damage in any particular period of time. There are too many accident and damage reports to keep the specifics straight.

Each time there is unknown damage an ICP or initial Contact Report (Damage Report) must be completed. If copies of these are obtained they would cover the accidents involving unknown damage.

These usually are vandalism damage but accident do occur on rare occasions. For the Trooper not to know there is damage to the squad car is unusual. This and her failure to report the meter light damage were issues.

Another issue against CP was raised when, a previous boyfriend reported that CP had a confrontation with him in violation of a court order. Peper heard that she lost control of herself and a police department was called. Peper heard that this was part of the reason for her discharge. Peper heard that the other part of her problem was her failure to report her accidents.

When a trooper has unknown damage, they do the report and take the pictures. R does not give them a problem over the incident. However, it would be passed on to the FTO officer and they would take any action, if needed.

Peper recalls that CP had personalized plates on her own vehicle with the word "Bogie." Peper refers to OP as Bogie for that reason believing that it is a name she uses in reference to herself.

Female officers in. the District are treated the same as male officers. CP was treated the same as any other Trooper,

whether male or female, Black or White, all troopers are treated equally at R.

Peper recalls when there were few females at R but now 10% or 15% of the Troopers are females and they are treated the same as males.

Peper recalls that when he came on in 1992, it was thought that females should be protected. Peper has changed and knows that female Troopers are as capable and can do the same job as the males. The first female Troopers began at R in 1977.

Jean is a minority officer who is now retired.

Trooper Greg Darby is Black. Darby is the only Black Trooper currently employed in District 2500.

CP is the first Black female to make it through the Academy.

Supreme Court, U.S.
FILED
JUN 15 2001
CLERK

No. 00-1729

IN THE

Supreme Court of the United States

ANN BOGREN,

Petitioner,

v.

THE STATE OF MINNESOTA; DEPARTMENT OF PUBLIC SAFETY; DONALD DAVIS, Commissioner of the Department of Public Safety, in his official capacity; MINNESOTA STATE PATROL; ANN BEERS, Chief of the State Patrol, in her official capacity; LIEUTENANT THOMAS FRASER OF THE STATE PATROL, personally and individually; LIEUTENANT LORI HODAPP OF THE STATE PATROL, personally and individually; and LIEUTENANT COLONEL STEPHEN MENGELKOCH OF THE STATE PATROL, personally and individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS LIEUTENANT THOMAS FRASER AND LIEUTENANT LORI HODAPP

JENNIFER J. DUCHSCHERER
GREGG M. CORWIN*
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167627

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(800) 274-3321 • (800) 359-6859

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1. The letter of violation written by a director of EEOC, on behalf of the Commissioner of the EEOC, finding that the evidence establishes that the defendant discriminated against petitioner does not mandate a denial of defendant's motion for summary judgment because it does not automatically create a genuine issue of material fact. 8

2. Petitioner did not raise the EEOC letter of violation issue at the Eighth Circuit level and so cannot raise it before this Court. 13

3. The Eighth Circuit Panel did not depart from the mandate of *Reeves v. Sanderson* when it determined that even when giving credence to the petitioner's evidence, and taking the evidence which tends to support petitioner's case, the record as a whole did not support an inference of intentional discrimination. 14

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1. The Panel's method of analyzing a summary judgment motion was perfectly in line with Reeves v. Sanderson, as well as other case law when it drew all inferences in favor of the petitioner and still found that summary judgment was appropriate. 14

2. The panel weighed all the evidence in favor of petitioner and determined she failed to carry her burden because she did not establish that she was terminated for any other reason than her criminal citation and history of poor performance. 16

3. The panel was correct in determining petitioner's proffered "similarly situated" argument did not support her pretext burden. 20

4. The panel considered petitioner's statistical and minority employment arguments, and her claims concerning the deficiencies in her performance evaluations and found that neither supported a claim of pretext. 23

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STATEMENT OF THE CASE

Petitioner Ann Bogren, a black female, entered the Minnesota State Patrol Training via a Peace Officers Career Opportunity Training Program (POCOP), in June 1994. POCOP was specifically developed and administered by the Minnesota law enforcement community in an effort to recruit non-traditional applicants, including women and minorities, to careers in law enforcement. (*See* Respondents' Lodging L-3; hereinafter "Resp. L-__".) POCOP is a twenty-two week program that provided the classroom and training skills necessary to qualify for licensure, a prerequisite for admission to the State Patrol's Training Academy. (*Id.*)

Petitioner completed the POCOP program in November 1994 and began a fifteen-week training regimen at the State Patrol Training Academy. (Resp L-4) Bogren completed the Training Academy, graduating 23rd out of 27 cadets, and was sworn in as a Minnesota State Trooper on February 25, 1995, beginning her mandated one-year probationary period. (Resp. L-1) During this same time, the Minnesota Department of Public Safety launched an investigation into the training environment at the academy. (Resp. L-8-15) This investigation was in response to two former cadets claims of gender harassment and discriminatory conduct. (*Id.*) Petitioner was interviewed during this investigation but did not identify any incidents where she was harassed or discriminated against. (*Id.*) Petitioner explained that while there were incidents at the Academy which she found inappropriate, she did not believe they were directed solely at females. (Resp. L-16-24) Petitioner identified some situations where she felt she was treated differently than other cadets but those situations were not race or gender based. (*Id.*) Petitioner also stated that the instructors often made sexual comments, yet none of the comments were

ever directed towards her. (Resp. L-20) At no time in this interview did Petitioner state that she was personally treated differently because of her race or sex. (Resp. L-7, 16-24)

After her February 25, 1995 graduation from the Academy, Petitioner immediately began her field training: a standardized, structured, four-step plan in a geographic area she would eventually patrol, and was assigned to field training officers (FTO) who oversaw her performance. At the beginning of Petitioner's probationary period, her evaluations were fairly positive, but more than one identified her driving skills as an area requiring improvement. (Pet. A-63, 65-71)[1] Towards the end of her probationary period, Petitioner received much more criticism and had developed an antagonistic relationship with her primary FTO, Trooper Brian Polansky. (Resp. L-25-32; Pet. A-66-67) Petitioner admitted that tension had developed between herself and Polansky. Petitioner's driving performance regressed during the final phase of her field training period, and Polansky documented several traffic violations by Petitioner that occurred on an almost daily basis, despite his instructions on the necessity of avoiding such violations. (*Id.*)

Polansky observed that Petitioner had difficulty paying attention to traffic signals and operating the vehicle while, at the same time, monitoring the radio and performing her job. (Resp. L-27-28) The FTOs also expressed concerns in a number of other areas including inadequate driving skills, inability to accept constructive criticism, personal conflicts, anger management and lack of candor and truthfulness. (Resp. L-98-103) Polansky felt that Petitioner reacted with resistance when he evaluated her performance after each traffic stop. (Resp. L-28)

1. "Pet. A-#" refers to the Petitioner's Appendix which was submitted with its Petition for Writ of Certiorari.

Despite these concerns, Petitioner advanced in May 1995, beyond the field training program, was assigned a solo patrol car and started her solo patrol. As a solo probationary patrol officer, Petitioner generally received satisfactory marks from her initial supervising lieutenant, Lieutenant Al Kutz, however her driving problems continued to be a concern. (Pet. A-63-72; Resp. L-32-36) Petitioner was involved in an incident where she hit a metering ramp light and knocked it over. (Resp. L-35) Petitioner admitted hitting the light but was hesitant to file an accident report with the patrol. (Resp. L-35, 38) Petitioner had to be coaxed to make the report but ultimately did file the report on the day of the accident. (*Id.*) Lieutenant Kutz later questioned Petitioner about the accident and specifically asked whether any damage had occurred to her patrol car. (*Id.*) Petitioner denied damage but upon Lt. Kutz's inspection, he noted that there was some. (Resp. L-35) Petitioner was also involved in an incident in August 1995, in which she made a U-turn on an interstate entrance, causing two other vehicles to crash. (Resp. L-100)

The final incident leading to Petitioner's non-certification involved a domestic incident with her former boyfriend, Steve Johnson. Subsequently, based on a review of her performance, Petitioner was non-certified as a probationary trooper with the Minnesota State Patrol. (Pet. A-171) The decision to give Petitioner the option of resigning or to be non-certified was based on Petitioner's entire performance record, including the domestic incident and all the incidents that led up to the domestic incident. (Pet. A-171-172)

Lieutenant Fraser and Hodapp had extremely limited contact with Petitioner. For the major part of Petitioner's tenure with the patrol, Kutz was Petitioner's immediate supervisor and oversaw her performance which was documented by different FTOs. (Resp. L-34) In his affidavit, Fraser stated that he only

had direct supervisory responsibility over Petitioner for the three week period between when Lt. Kutz left and Hodapp assumed Lt. Kutz's responsibilities. (Resp. L-94) In October 1995, Hodapp replaced Lt. Kutz as Petitioner's supervisor. (Resp. L-96-97) Captain Stephen Mengelkoch was Fraser's and Hodapp's immediate supervisor. Fraser investigated the domestic incident between Petitioner and Steve Johnson, and Hodapp wrote the supervisor's report dated November 11, 1995, which summarized Petitioner's performance. (Resp. L-93-97)

On October 22, 1995, while off-duty, Petitioner went to the home of her former boyfriend, Steve Johnson, to retrieve a set of keys. (Resp. L-58, 69) While in Johnson's house, Petitioner attempted to take a set of oriental tea cups she had previously given Johnson, and an argument ensued. (Resp. L-72) As Petitioner left, the tea cups were broken and Johnson called the Columbia Heights Police Department to report the cup-breaking incident. (Resp. L-51-52) Johnson also called the patrol office and left a message complaining about Petitioner's conduct. (Resp. L-94) In the early morning hours of October 23, 1995, Fraser received a call notifying him that Johnson was calling the patrol office regarding a complaint on Petitioner. (*Id.*) Fraser was given Johnson's home telephone number and proceeded to call it. (Resp. L-85, 88, 90, 91, 94) The number was continually busy. (Resp. L-85, 91) In the meantime, Johnson called the patrol again and gave his cell phone number to the dispatcher. (Resp. L-91, 94) Fraser did not know Johnson but Johnson identified himself as Petitioner's ex-boyfriend. (Resp. L-92) When Fraser was finally able to contact Johnson, Johnson told Fraser that Petitioner came into Johnson's house yelling at Johnson, calling Johnson's new girlfriend names and breaking four Japanese souvenir mugs on the floor. (Resp. L-94) Johnson told Fraser that the local police had been called. (Resp. L-92, 94) Fraser tried calling Petitioner

regarding Johnson's complaint. (*Id.*) Fraser did call the Columbia Heights police and learned that the police had issued a citation to Petitioner for criminal damage to property. (Resp. L-87, 94) Petitioner admitted to the Columbia Heights police officer who contacted her that she was at Johnson's home, that an argument occurred and that cups were broken. (Resp. L-51-52)

The next morning Fraser informed his superior, Captain Mengelkoch, of the altercation between Petitioner and Johnson. (Resp. L-94) To Mengelkoch, the altercation between Petitioner and Johnson was extremely important. (Resp. L-45, 48; Pet. A-10) He felt that the incident in and of itself was enough to have a probationary employee non-certified. (*Id.*) Mengelkoch, in consultation with Chief Chabries, ordered an internal investigation into the matter. (Resp. L-45). Fraser was assigned the task of conducting the investigation. (Resp. L-37-38, 48- 49; Pet. A-106-107)

On November 1, 1995, Fraser conducted a taped interview with Petitioner. (Resp. L-55-83, 94) Petitioner's attorney was present when the statement was taken. *Id.* In her statement, Petitioner admitted to going over to Johnson's house on the night of October 22, 1995, looking in the window to see if he was at home, knocking at the door, being let in, and arguing with Johnson. (Resp. L-61, 64) In his interview with Fraser, Johnson stated that Petitioner asked Johnson what he was doing with his "white bitch" girlfriend. (Resp. L-61, 86) Ultimately, some of Johnson's mugs were broken in the altercation. (Resp. L-53, 61) Petitioner admitted that she was upset and angry during the incident. (Resp. L-63-64) Fraser felt that many of Petitioner's answers were less than forthright. Fraser was troubled by two major incidents in the interview. (Resp. L-88) First, petitioner's evasiveness and untruthfulness in regard to Fraser's questions about her anger counseling.

(Resp. L-65-66, 88) Fraser was very specific as to the sex, location and the employer of the anger counselor, and yet Petitioner denied it all. (*Id.*) She denied seeking an anger counselor but after Fraser rephrased the question, and she consulted with her attorney, she admitted to seeking a counselor "who specializes in anger to how someone deals with it." (*Id.*) The other incident that troubled Fraser was in regards to the "breakup" with Johnson. (*Id.*) She initially denied that they had broke up approximately two months or eight weeks before the tea cup incident. (Resp. L-56) However, through follow up questions she admitted that six weeks prior to the tea cup incident there was a conversation which led to a "separation." (Resp. L-78) Fraser believed this subsequent answer made the first answer at least evasive, if not a lie. (Resp. L-84-89) Fraser found Petitioner's overall candor and truthfulness was questionable at best, and that her evasiveness was obvious and that it impeded the investigation. (*Id.*) Fraser submitted his report to the Patrol on November 3, 1995. (*Id.*)

On November 8, 1995, Petitioner was given the option to resign or not be certified. (Resp. L-50) This decision was made by Chief Chabries. (Resp. L- 50; Pet. A- 171-72) Chabries stated in an affidavit that he made the termination decision based on conversations with and reports by Hodapp, Fraser and Mengelkoch. (Pet. A-171-72) At Petitioner's attorney's request, Petitioner was given until November 14, 1995 to make her final decision. (Resp. L-47, 50) In the meantime, Mengelkoch assigned Hodapp the task of writing a report for Petitioner's attorney, which summarized the patrol's reasons for Petitioner's non-certification. (Resp. L-49-50, 97) Mengelkoch assigned this task to Hodapp because of her writing ability. (*Id.*) Neither Fraser nor Mengelkoch directed Hodapp on what should go into the report. (Resp. L-49, 97) Hodapp was merely instructed to pull the files together and document Petitioner's performance and the patrol's recommendation in concise report. (*Id.*)

Hodapp did as instructed and based on the information already in Petitioner's file, wrote a Supervisor's Report of Probationary Trooper Ann Bogren. (Resp. L-98-103) This report summarizes Petitioner's performance issues with the patrol. Most of the issues summarized in the report occurred while Lt. Kutz was Petitioner's supervisor. (*Id.*) These issues included, but are not limited to, personal conflict Petitioner had with Polansky; the accident on May 24, 1995 where Petitioner knocked over a ramp metering light; an accident in August 1995; a hit and run investigation complaint; damage to Petitioner's squad care; and the internal affairs investigation regarding the Johnson incident. (Resp. L-100-01) The report concluded with the recommendation of the supervisory staff of District 2500 that Petitioner should either resign or be non-certified. (Resp. L-50, 103)

On November 14, 1995, Petitioner and her attorney met with Captain Halverson and Mengelkoch. (Resp. L-47, 50) At the conclusion of this meeting, Petitioner's probationary appointment was non-certified for non-discriminatory reasons. (Resp. L-104) Shortly, after her termination, Petitioner pleaded guilty to the reduced charge of petty misdemeanor criminal damage to property. Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and on December 15, 1997, the EEOC issued a right to sue letter. Petitioner then filed suit.

REASONS FOR DENYING THE WRIT

1. The letter of violation written by a director of EEOC, on behalf of the Commissioner of the EEOC, finding that the evidence establishes that the defendant discriminated against petitioner does not mandate a denial of defendant's motion for summary judgment because it does not automatically create a genuine issue of material fact.

Summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Harvey v. Anheuser-Busch, Inc*, 38 F.3d 968, 971 (8th Cir. 1994) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). It follows that, if the party does not meet this burden the fact finder may award summary judgment to the moving party. The mere existence of an Equal Employment Opportunity Commission (EEOC) letter of violation does not disturb the party's burden or this ability of the fact finder. Contrary to Petitioner's assertion, rather than disagreement among the circuits, each jurisdiction unanimously agrees that neither an EEOC letter of violation nor probable cause finding mandates the denial of summary judgment, or automatically allows the moving party to reach their burden of proof.

Congress enacted the EEOC procedures assuming that "administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases." *Moteles v. Univ. of Pennsylvania,* 730 F.2d 913 (3d Cir. 1984). Certain jurisdictions have also recognized this special ability and found the EEOC investigation and expertise acquired by its field investigators in the area of discriminatory

employment practices, makes any findings of discrimination highly probative of the ultimate issue involved in such cases. *See Smith v. Universal Services, Inc.*, 454 F.2d 154, 157 (5th Cir. 1972). But despite this expertise, EEOC findings "are not homogeneous products; they vary greatly in quality and factual detail." *Johnson v. Yellow Freight System, Inc.*, 734 F.2d 1304, 1308 (8th Cir. 1984). The uncertain nature and quality of these findings makes it an absurd suggestion that every jurisdiction must be required to allow the non-moving party to survive summary judgment by simply introducing a letter of violation or probable cause finding. Such a mandate would eviscerate the judicial system as we know it. Rather than encourage the EEOC's conciliation efforts as Petitioner suggests, every case for which the EEOC issues a probable cause determination would, by definition, go to a jury. The moving party would have no defense, and summary judgment could never be used to eliminate meritless discrimination claims. This Court cannot support such a result.

The disagreement among the circuits revolves around whether an EEOC finding is *per se* admissible in Title VII cases, and not whether summary judgment should always be defeated if a probable cause finding exists. Even those courts that believe such a finding is always admissible, do not take away the courts discretion to decide whether the independent facts before the district court establish a genuine issue of material fact. *See e.g., Coleman v. Quaker Oats*, 232 F.3d 1271 (9th Cir. 2000); *Smith v. Universal Services, Inc.*, 454 F.2d 154, 156-158 (5th Cir. 1972). The trial courts ultimate function would be eliminated if the nonmoving party's claims were allowed to go forward based only on the EEOC finding, when the rest of the evidence before the court does not support this finding. The justice system would buckle under the load of meritless discrimination cases that would have to be tried.

When the panel decided petitioner's case must fail because she did "not present sufficient evidence from which a reasonable fact finder could disbelieve the state's nondiscriminatory explanation for her termination," it was perfectly in line with Eighth Circuit, as well as all other circuits that have held a probable cause finding is not determinative of discrimination, and that there must be other independent evidence to survive summary judgment. *See Bassett v. City of Minneapolis*, 211 F.3d 1097, 1104 (8th Cir. 2000); *see also Simms v. Oklahoma ex rel. Department of Mental Health & Substance*, 165 F.3d 1321 (10th Cir. 1999); *Nerenberg v. RICA of Southern Maryland*, 570 A.2d 655 (Md. App. 2000). "When the independent facts before the district court judge fail to establish a genuine issue of material fact, a favorable EEOC letter of determination does not create one." *Simms*, 165 F.3d at 1331.

The Fourth Circuit supports this view and has consistently held that even when the EEOC finds probable cause and issues a right-to-sue letter, summary judgment may be appropriate. *See e.g., Goldberg v. B. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1988). When there is no actual proof sufficient to support a jury verdict, the trial court may correctly grant summary judgment. *See id.* The court believes that if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *See Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987).

The quality, and or factual basis of the EEOC finding has caused courts within the same circuit to view the probative value of the finding differently. In the Ninth Circuit, in *Coleman v. Quaker Oats*, 232 F.3d 1271 (9th Cir. 2000), the court explained that although the EEOC letter can be a "highly probative evaluation of an individual's discrimination complaint" it could not be determined from the letter in that case "what facts the

EEOC had considered" or how it had analyzed those facts. Therefore, the quality of the letter did not allow the nonmoving party to survive summary judgment. However, in *Gifford* the Ninth Circuit found the EEOC's reasonable cause finding to be sufficient to create an issue of fact on the question of whether male employees had been treated differently. *See Gifford v. Atchison*, 685 F.2d 1149, 1156 (9th Cir. 1982). These differing results demonstrate that the determination of whether the EEOC finding presents sufficient evidence to allow the nonmoving party to withstand summary judgment is heavily fact based, and a case specific issue. In all cases, the trier of fact makes the final decision, and the simple existence of a probable cause finding does not automatically create a genuine issue for trial.

The Tenth Circuit has found EEOC findings "highly probative" but has also required there to be "independent facts before the district court" which establish a genuine issue of material fact. *Simms v. Oklahoma ex rel. Department of Mental Health & Substance*, 165 F.3d 1321, 1331 (10th Cir. 1999); *see Cervantes v. Wal-mart Stores, Inc.*, 2001 U.S. App. LEXIS 63 (10th Cir. Jan. 3, 2001). In the unpublished opinion for *Cervantes*, the court explained that the case would be remanded so that the trial court could consider the EEOC report because such reports have "probative value." *See Cervantes*. However, the court did not say that the nonmoving party would automatically survive summary judgment on reversal, but only that the trial court had to consider the report and then explain why it was "according no credence to [that] report." *See id.*

The Fifth Circuit is also very supportive of EEOC findings but realizes their limitations. In *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972), the court recognized that EEOC findings are "highly probative of the ultimate issue involved in [discrimination] cases" but that "the report is in no

sense binding on the district court and is to be given no more weight than any other testimony given at trial." *See id.* at 157. The court also recognized the court's discretion in admitting such reports and actually compared the EEOC report to accident reports admissible under the Federal Business Records Act. *See id.* Although these reports are similarly prepared in "the regular course of the Commission's business and in accordance with express statutory authority," this regularity does not by itself, "require admissibility." *See id.* at 157-58.

The Eighth Circuit similarly follows this discretionary view. "It would be ill-advised to shackle the discretion of the trial judges with a rule of *per se* admissibility" since EEOC determinations are of varying quality and therefore, the admission of "EEOC reasonable cause determinations is to be left to the sound discretion of the trial court." *Johnson v. Yellow Freight System, Inc.*, 734 F.2d 1304, 1309 (8th Cir. 1984). Even an EEOC reasonable cause determination does not eliminate the trier of fact's position as the ultimate decision maker.

The question of whether an EEOC letter of violation or an EEOC determination of reasonable cause creates a genuine issue of material fact concerning whether the defendant discriminated against the plaintiff, or precludes a court from concluding that no reasonable fact finder could find discrimination, is not a question that needs to be answered by this Court. The circuits are consistent in their conclusion that the trier of fact is the ultimate decision maker. Whether that person(s) finds the EEOC finding probative, and in fact probative enough to allow the nonmoving party to survive summary judgment, is a case specific question that can continue being answered using the specific facts of the case. No matter whether the circuit has a *per se* admissibility rule, or leaves this admission to the court's discretion, petitioner can point to no circuit that mandates that

every plaintiff that presents an EEOC probable cause finding or letter of violation must survive summary judgment. Such a mandate is prohibited by the very rules petitioner relies on for her position. This Court cannot take away the trial court's function of weighing the evidence and determining if there is a genuine issue of material fact that requires the case to move past summary judgment. That is a determination that has always, and must always be left with the trier of fact. There is no need for this Court to settle a nonexistent disagreement among the circuits or disturb a sound discretionary policy.

2. Petitioner did not raise the EEOC letter of violation issue at the Eighth Circuit level and so cannot raise it before this Court.

Generally, a federal appellate court does not consider an issue not passed upon below. *See Singelton v. Wulff*, 428 U.S. 106, 120 (1976). Although it is within the court's discretion to consider an issue not raised in the trial court, that discretion should be used sparingly. *See United States v. Latrobe Construction Co.*, 246 F.2d 357, 362 (8th Cir. 1957). Petitioner did not raise the issue concerning the court's consideration of her EEOC letter of violation and should be deemed to have abandoned any such argument. *See e.g., Mogis v. Lyman-Richey Sand & Gravel Corp.*, 189 F.2d 130, 133 (8th Cir. 1951). Respondents' have had no opportunity to present evidence they believe is relevant to this issue and have in essence been "surprised." *See Singelton*, 428 U.S. at 120. Petitioner's Eighth Circuit argument was void of any reference whatsoever to the EEOC letter of violation, or the district court's failure to give sufficient weight to that letter in its summary judgment decision. This Court should use its discretion to deem the EEOC issue abandoned and therefore, not properly before this Court.

3. The Eighth Circuit Panel did not depart from the mandate of *Reeves v. Sanderson* when it determined that even when giving credence to the petitioner's evidence, and taking the evidence which tends to support petitioner's case, the record as a whole did not support an inference of intentional discrimination.

1. The Panel's method of analyzing a summary judgment motion was perfectly in line with Reeves v. Sanderson, as well as other case law when it drew all inferences in favor of the petitioner and still found that summary judgment was appropriate.

The *Reeves* decision reiterated the longstanding principle that "a court should render judgment as a matter of law when a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Reeves v. Sanderson*, 120 S. Ct. 2097 (2000) (quoting Fed. Rule Civ. Proc. 50(a))(internal quotations excluded). In making this decision the court "must review the records taken as a whole." *Reeves*, (citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Even after this favorable review, summary judgment is appropriate against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 971 (8th Cir. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

The moving party is entitled to judgment as a matter of law as long as he/she carries his/her burden of showing the absence of a genuine issue of material fact. *See Lynn v. Deaconness Medial Center-West Campus*, 160 F.3d 484, 487 (8th Cir. 1998).

In discrimination cases, there are duel burdens because the moving party bears the burden of showing the absence of a genuine issue of material fact, and the plaintiff retains at all times the ultimate burden of persuading the trier of fact that the adverse employment action was motivated by intentional discrimination. *See id.* If the plaintiff cannot carry this burden, the moving party will prevail.

The Eighth Circuit was perfectly in line with summary judgment case law when it found that the petitioner's pretextual evidence was insufficient to reject the respondent's legitimate, nondiscriminatory reasons for her termination. In reviewing the decision, the panel could not duplicate the district court's function by making its own determination of facts and reversing even if it would have decided the case differently. *See Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1212 (8th Cir. 1985). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* The panel even considered certain evidentiary material that the district court had decided was irrelevant, and yet still found that the petitioner failed to carry her burden, and that respondent was entitled to summary judgment. The district court's account of the evidence was plausible in light of the record viewed in its entirety. *See Anderson v. City of Bessemer*, 470 U.S. 564 (1985). There were no credibility determinations made by the panel. The panel fully heard the issues, was sympathetic to petitioner's claim, but was left with the conclusion that there were no legally sufficient evidentiary bases for a reasonable jury to find for the petitioner. Based on petitioner's failure to carry her burden of persuasion, the panel's decision in no way violates *Reeves v. Sanderson*.

2. *The panel weighed all the evidence in favor of petitioner and determined she failed to carry her burden because she did not establish that she was terminated for any other reason than her criminal citation and history of poor performance.*

In a race discrimination suit the pattern of proof is well established. "First, a plaintiff must establish a 'prima facie case' by proving a set of facts sufficient to give rise to an inference of discrimination." *Patterson v. Masem*, 774 F.2d 251, 254 (8th Cir. 1985). Next, the defendant must articulate a legitimate, nondiscriminatory reason for the employment decision. *See id.* Finally, if these first two burdens are met, "the plaintiff is granted an opportunity to show that the justifications offered are but pretexts to conceal the employer's improper motivation." *Id.* (citing *McDonnell Douglas Corp.*, 411 U.S. 792, 802-05 (1973). "The plaintiff at all times retains the ultimate burden of persuading the trier of fact that the adverse employment action was motivated by intentional discrimination." *Lynn v. Deaconness Medial Center-West Campus*, 160 F.3d 484, 487 (8th Cir. 1998). The critical summary judgment inquiry is whether the plaintiff came forward with sufficient evidence "to permit the trier of fact to find that a discriminatory or retaliatory reason motivated the discharge." *Harvey*, 38 F.3d at 971.

The U.S. Supreme Court's *Reeves* decision specifically clarifies that "disparate treatment liability depends on whether the protected trait actually motivated the employer's decision." *Reeves v. Sanderson*, 120 S. Ct. 2097 (2000) (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). Race or gender must have "actually played a role in [the employer's decision making] process and had a determinative influence on the outcome." *See id.* In deciding whether petitioner has met this burden, "it is not enough . . . to *dis*believe the employer; the factfinder must

believe the plaintiff's explanation of intentional discrimination." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993). Even though the Court later clarified this statement by stating that disbelief of the reasons put forward by the defendant, together with the elements of the prima facie case, may suffice to show intentional discrimination, this ultimate inference still depends on the plaintiff presenting evidence that causes the defendant's reasons to be disbelieved. *See id.* at 511. Although the Court reasoned it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the respondent's explanation, petitioner did not present sufficient evidence to show the respondent's reasons were false.

The Eighth Circuit assumed petitioner set forth sufficient evidence to support her prima facie case of discriminatory discharge. However, after thoroughly reviewing the record, the panel concluded that petitioner did not demonstrate that the state's proffered nondiscriminatory reasons for her termination were pretextual. The state met its burden of advancing a legitimate, nondiscriminatory reason for petitioner's termination when it explained that its decision was based on a combination of considerations including: (1) petitioner's conduct at Johnson's home; (2) her poor driving performance; (3) concerns over her accountability; (4) her evasiveness during the investigation of Johnson's complaint; and (5) concern that she might present a disciplinary problem after completion of her probationary period. (Pet. A-171-172) To carry her burden, petitioner had to present evidence that rejected all of the respondents' reasons because anyone alone sustained its burden. As a probationary employee, petitioner could be terminated for anyone of these reasons. (Pet. A-172)

Petitioner was a probationary employee who was cited for criminal damage to property. Petitioner tries to avoid this

criminal citation by claiming she was discharged by respondents for discriminatory reasons, while failing to reconcile the fact that the respondent's were not even involved in the issuance of this citation. As a probationary employee this criminal citation alone was enough to justify her termination. (Pet. A-110, 113) Petitioner believes the actual incident that resulted in the criminal citation was so minor as to not justify her termination. However, it was not for respondents or the panel to question the reasoning behind the issuance of the criminal citation. The citation was issued and later plead guilty to by respondent, and the analysis starts from that point. Captain Mengelkoch explained that it did not matter whether she was issued a citation or not, the behavior that led to that citation was "inappropriate" and resulted in petitioner's dismissal for conduct unbecoming an officer. (Pet. A-110)

Petitioner argues that the respondents made certain misrepresentations to the EEOC and those misrepresentations should support her pretext argument. Specifically, a letter to the EEOC states petitioner was non-certified because she was "arrested" following a domestic incident. (Pet. A-101) This mistaken information is in no way sufficient to find the respondents' asserted justifications for discharge were false. Captain Mengelkoch specifically explained that he knew petitioner was not arrested, and that she was not non-certified because of a criminal arrest. (Pet. A-105-106) This testimony establishes that this mistaken "arrest" statement in no way affected the respondent's decision and therefore, does not support petitioner's pretext argument.

The issuance of the criminal citation resulted in an internal investigation. Petitioner's behavior during this investigation, along with her documented driving deficiencies, provided the respondent with additional support for its termination decision.

Petitioner's traffic violations and driving deficiencies were documented in her very first FTO biweekly evaluation, and continued to be documented into her probationary period. (Pet. A-63-71; Resp. L-34, 37) Petitioner was reported as having difficulty paying attention to traffic signals while operating the patrol car, monitoring the radio and performing her job. (Pet. A-67; Resp. L-27-31) In addition to these continuing driving deficiencies, petitioner demonstrated questionable accountability. (Resp. L-45)

When petitioner was involved in the meter light incident, a fellow trooper reported that petitioner had to be aggressively encouraged to make a report of the incident. (Resp. L-35) Even when petitioner did finally made the report, she was not happy about it. (*Id.*) Fraser also determined petitioner to be less than accountable in her internal investigation interview. (Resp. L-88) When asked about anger management petitioner initially denied she ever saw a counselor, but when Fraser rephrased the question petitioner admitted to seeing a counselor that "specialized in anger management." (Resp. L-66-67, 88) Petitioner also gave differing answers when questioned about the status of her relationship with Steve Johnson. At first she denied that they split up approximately eight weeks prior to the tea-cup incident but when questioned again later, she admitted to being "separated" for approximately six weeks. (Resp. L-54,78) The panel determined that after reviewing the interview with petitioner that it was a reasonable conclusion that petitioner had been evasive and untruthful. However, even if petitioner was truthful during her interview with Fraser, she failed to present evidence that Fraser's conclusions were based on race or gender discrimination. (Pet. Brief at 30) There is no nexus between the conduct that resulted in petitioner's termination and race or gender discrimination.

Finally, respondents were concerned with the disciplinary problem petitioner might present after her probationary period. (Pet. A-172). If petitioner were allowed to proceed past her probationary period she would be covered by the collective bargaining agreement and could only be discipline or discharged for "just cause." Respondents should not have to take the chance that a problem probationary officer will improve when certified. The whole point of the probationary period is to flesh out potential problems and make decisions that produce the best troopers for the patrol. By questioning respondents decision to terminate, petitioner is doing nothing more than attacking the business judgment of respondent in how it chose to evaluate its employees. As long as its choices are not discriminatory, respondent is entitled to these judgments. In this case petitioner could not prove her termination was for discriminatory purposes because she failed to demonstrate pretext with respect to respondents' assertion that, given her probationary status, she was terminated for engaging in conduct unbecoming an officer.

3. The panel was correct in determining petitioner's proffered "similarly situated" argument did not support her pretext burden.

Petitioner made an equal protection claim against respondents Fraser and Hodapp under 42 U.S.C. § 1983. She also claims this equal protection argument supports her pretext burden and shows her termination was a product of intentional discrimination. To recover under § 1983, petitioner must show that while acting under color of state law, the respondents deprived her of a right secured by the Constitution. *Hafer v. Melo*, 502 U.S. 21 (1991). "Employees are similarly situated when they are involved in or accused of the same offense and are disciplined in different ways." *Harvey*, 38 F.3d at 972 (citing *Boner v. Board of Comm'rs*, 674 F.2d

693, 697 (8th Cir. 1982)). Petitioner must show that she was treated differently than other similarly situated persons due to her belonging to a protected class. Petitioner claims she was treated differently as a black female probationary employee, but she cannot show that she was treated differently than males or Caucasians. Petitioner presented no evidence that any of the other probationary officers ever received a comparable criminal citation, nor that concerns over their accountability, driving performance or tendency to prevaricate were raised during their probationary period. Petitioner also did not show that they were involved in motor vehicle accidents while they were on patrol. Petitioner's only assertion to support her allegation that she was treated differently from other similarly situated persons was her own unsubstantiated, undocumented statements.

The panel actually disagreed with the district court's conclusion that petitioner only compared herself to nonprobationary troopers, and instead found that the patrol did not discipline several white male probationary troopers when citizen complaints were lodged against the troopers or when disciplinary issues arose. (Pet. Brief at 11,12) However, even after considering all these nonprobationary officers, petitioner's evidence was insufficient to establish pretext or sustain her equal protection claim against Fraser and Hodapp. The record only reflects that two probationary troopers received a single citizen complaint, both of which were investigated and found to be unsustained, and a third received two citizen complaints. (Pet. Brief at 12) Petitioner's misconduct and history were not similarly situated to the other probationary troopers. Additionally, petitioner did not show that the supervisor or supervisors responsible for her termination were also involved in the disciplinary action, or lack thereof, of the white male probationary officers. *See id.* "When different decision-makers

are involved, two decisions are rarely similarly situated in all relevant respects." *Harvey*, 38 F.3d at 972 (citing *Jones v. Frank*, 973 F.2d 673, 676 & n.3 (8th Cir. 1992)).

Petitioner tried to support her equal protection and pretext arguments by comparing herself to nonprobationary troopers, however such comparisons are not probative because the petitioner was not similarly situated with those troopers. *See Blanding v. Pennsylvania State Police*, 12 F.3d 1303, 1309-10 (3d Cir. 1993) (recognizing that tenured troopers are not similarly situated to probationary troopers). Petitioner had to serve a one year probationary period before she could be certified. Once a trooper satisfactorily completes the probationary period and becomes a certified trooper, only then can the trooper be protected by Minn. Stat. § 299D.03, subd. 8.[2] Petitioner's Appointment Letter dated February 14, 1995 specifically provides for at-will employment for a period of one year. (Resp. L-1) Therefore, petitioner cannot compare herself to non-probationary members of the patrol whose employment is governed by a collective bargaining agreement and who can only be terminated for "just cause." As the panel concluded, petitioner can only compare herself to probationary troopers and that comparison does not show she was similarly situated to any other probationary trooper, and therefore the panel was correct in determining she was not terminated for discriminatory reasons.

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2. Minnesota Statutes Section 299D.03 provides that the Patrol may not terminate a trooper with six months continuous service except for just cause.

4. The panel considered petitioner's statistical and minority employment arguments, and her claims concerning the deficiencies in her performance evaluations and found that neither supported a claim of pretext.

Petitioner contends that the fact that she is the only black female trooper, and one of the few black troopers, ever employed by the patrol is circumstantial proof of pretext. The panel explained that in *Hutson v. McDonnell Douglas Corp.* it recognized that statistical evidence "may support a finding of pretext, particularly where there are independent, direct grounds for disbelieving the employer's explanation for discharge." (Pet. A-13), 63 F.3d 771, 778 (8th Cir. 1995). The Eighth Circuit has similarly recognized the added support of statistical evidence in *Kim v. Nash Finch Co.*, when it found that in addition to other evidence that the proffered reason was false, pretext was established by evidence that out of 3,500 employees, only 2 management employees in 25 years were nonwhite. 123 F.3d 1046, 1059 (8th Cir. 1997). However, in the present situation, the panel determined that the evidence presented by petitioner was insufficient to establish a genuine issue of pretext for two reasons: (1) there was not independent evidence to support a finding of pretext and (2) the generic type of employment statistics presented by petitioner were not probative of the reason for her termination. (Pet. A-13); *See Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1319 (10th Cir. 1999) ("Because overall employment statistics have little bearing on the specific intentions of the employer in making particular hiring decisions such statistical evidence will rarely suffice to rebut an employer's legitimate, nondiscriminatory reasons for a particular adverse employment action."); *see also Hutson*, 63 F.3d at 777 (explaining that the statistical evidence failed to control the variable relied upon by the employer for its discharge of the

employee). Based on these deficiencies the panel found the petitioner failed to present sufficient evidence from which a reasonable fact finder could disbelieve the respondents' nondiscriminatory explanation for her termination.

Petitioner also tried to support her argument in support of pretext by asserting that there is evidence of blatant lies and inaccuracies in the supervisors report recommending her termination. However, this report is merely a recitation of issues and concerns raised by other troopers during petitioner's probationary period, which are supported by the record, and a summarization of the tea-cup incident at Johnson's home. (Pet. A-172-173; Resp. L-98-103) The panel correctly concluded that there was no evidence to support petitioner's argument because there was no evidence related to the report's preparation that would cause a fact finder to question the explanation offered by respondent. (Pet. A-12)

Finally, petitioner claims the panel erred when it failed to conclude that the evidence in the supervisor's report failed to credit the many positive comments in her performance evaluations. Failure to consider every comment contained in performance evaluations is not reversible error, nor does it establish respondents had discriminatory motives in terminating the petitioner. Respondent never denied there were favorable or satisfactory evaluation comments in petitioner's file. However, these comments do not require the respondent to ignore petitioner's deficiencies. The way respondent chooses to do and use its evaluations is a business judgment that petitioner cannot legitimately attack. Petitioner also tries to show respondents "driving deficiency" arguments are pretextual by pointing out commendations from the training academy. (Pet. Brief at 23) This commendation carries little weight in the real patrol world. Petition's performance at the academy is

irrelevant to her performance in the field. Actual field performance requires troopers to coordinate many more skills at a real life pace and does not allow for artificial protections. Petitioner's evaluations establish that she was not as capable a trooper in the field and these inadequacies were very relevant to the certification decision.

In conclusion, neither petitioner's statistical or general policy evidence nor her satisfactory performance evaluation comments prove respondents' legitimate, nondiscriminatory reasons for petitioner's termination are pretextual. Petitioner again failed to carry her burden, and the panel was correct in affirming summary judgment.

CONCLUSION

The question of whether an EEOC reasonable cause finding automatically projects a genuine issue of material fact into a case is not a question that needs to be addressed by this Court. The answer to this question is obvious and any other answer contradicts the judicial system as we know it. Accordingly, this Court should deny petitioner's petition. Petitioner's petition should also be denied because the Eighth Circuit Court of Appeals did not stray from longstanding summary judgment principles when it determined petitioner failed to carry her pretext burden with respect to her discrimination claims. The record before the panel sufficiently supported its decision as to petitioner's pretext arguments, and therefore its decision need not be overturned. Petitioner has presented no questions or issues that need to be examined by the United States Supreme Court and her petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT DOCUMENTS

[Omitted here but printed separately as Lodging]

(3)

Supreme Court, U.S.
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No. 00-1729

In The

Supreme Court of the United States

ANN BOGREN,

Petitioner,

v.

STATE OF MINNESOTA; DEPARTMENT OF PUBLIC SAFETY; DONALD DAVIS, Commissioner of the Department of Public Safety, in his official capacity; MINNESOTA STATE PATROL; ANN BEERS, Chief of the State Patrol in her official capacity;

LIEUTENANT THOMAS FRASER of the State Patrol, personally and individually; LIEUTENANT LORI HODAPP of the State Patrol, personally and individually; and LIEUTENANT COLONEL STEPHEN MENGELKOCH of the State Patrol, personally and individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS STATE OF MINNESOTA, DEPARTMENT OF PUBLIC SAFETY AND MENGELKOCH

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STATEMENT OF THE CASE

On March 10, 1998, Petitioner Ann Bogren ("Petitioner" or "Bogren") served and filed her Complaint on her former employer, State of Minnesota, ("State" or "Respondent") Department of Public Safety, and Public Safety officials in their individual capacity,[1] alleging race and gender discrimination, and retaliation under Title VII of the Civil Rights Act of 1964, as amended. Specifically, Bogren claimed that the State terminated her as a State Trooper on account of race and gender. Bogren served Respondent with an Amended Complaint, unsigned, on November 25, 1998.

On May 19, 1999, the State moved for summary judgment on all claims. By Memorandum Opinion and Order dated August 13, 1999, the court granted the State's motion, holding that Bogren failed to sustain her burden of showing that the employer's proffered reasons for her discharge were a pretext for discrimination. Bogren served and filed her Notice of Appeal in a timely fashion on September 13, 1999 and the appeal was briefed on schedule. The oral argument was heard on June 16, 2000. On December 22, 2000 a Panel of the Eighth Circuit Court of Appeals filed its unanimous decision affirming the district court. The Court of Appeals denied Petitioner's Petition for *En Banc* Review on February 15, 2001.

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[1] Of the Public Safety officials sued in their individual capacities, the undersigned represents only Lt. Col. Steven Mengelkoch. The others, Lt. Thomas Fraser and Lt. Lori Hodapp, are separately represented.

STATEMENT OF FACTS

Petitioner Ann Bogren entered the Minnesota State Trooper Academy via the Peace Officers Career Opportunity Program ("POCOP") in June 1994. This program was designed and administered by the law enforcement community specifically in an effort to recruit non-traditional applicants, including women and minorities. Lt. Mark Peterson Aff. at ¶ 4, RA 2.[2] Bogren is an African-American female. POCOP provided an opportunity to recruit individuals who were not yet licensed peace officers, train them free of charge for licensure, and then send them, in Bogren's case, to the State Patrol Training Academy. *Id.*, RA 2.

Bogren completed a 22 week skills course through the POCOP program during the summer and early fall of 1994. *Id.*, ¶ 10, RA 3. In November 1994, she began the 15 week State Patrol Training Academy. *Id.*, ¶ 11, RA 3. In response to a February, 1995, complaint of gender harassment by two other cadets, the Department of Public Safety and the State Patrol immediately initiated an investigation into the environment at the Training Academy at that time. Thelma James Aff. at ¶ 3, RA 14. Ms. Bogren was interviewed during this investigation and in that interview, she did not identify any harassing or discriminatory actions by members of the State Patrol against her. *Id.*, at ¶ 10, RA 15. In fact, *none* of the cadets interviewed identified any conduct which they found

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[2] Reference to Respondent's Appendix are designated as RA ___.

discriminatory based on race, gender or any other basis. *Id.*, at Ex. F, p. 4, RA 33.

Bogren completed the Training Academy, graduating 23rd out of 27 cadets, was sworn in as a Minnesota State Trooper on February 25, 1995, and began her mandatory one-year probationary period. Petitioner's App. at 82. After additional training in the field, the State Patrol assigned Bogren a squad car and she, like all other probationary troopers, started on solo patrol. On October 23, 1995, a Columbia Heights police officer issued a citation to Bogren for misdemeanor criminal damage to property involving her former boyfriend. Bogren Dep. Ex. 23, RA 40-41. On November 15, 1995, Bogren pleaded guilty to the reduced charge of petty misdemeanor criminal damage to property. Bogren Dep. p. 108, RA 39. According to the police reports, on October 22, 1995, at 11:18 p.m., Columbia Heights Police Officer William Schmidt responded to a call from 5029 6th Street, Columbia Heights, Minnesota, the home of Steve Johnson, regarding an incident reported by Johnson. Subsequently, Officer Schmidt questioned Bogren by telephone. Officer Schmidt's report indicates that Bogren admitted that she was at Mr. Johnson's house, they argued, and she "threw down four Oriental 'items' that she had bought him." Officer Schmidt charged Bogren with criminal damage to property in violation of Minn. Stat. § 609.595; and also advised Johnson on how to obtain a restraining order. *Id.*, Dep. Ex. 23, RA 40-41.

In addition to calling the police, Johnson also called the Minnesota State Patrol, just after midnight on October 23, 1995, and reported Ms. Bogren's conduct. Johnson's message was forwarded to Lt. Fraser because he was the

supervisor on duty. After Lt. Fraser reached Johnson by telephone, he took an initial statement from Johnson and he also spoke with the Columbia Heights Police Department. Fraser Dep. at pp. 77-78, RA 78. Lt. Fraser also obtained the Columbia Heights police report and subsequently took a taped statement from Johnson. Lt. Fraser provided this information to his supervisor, Captain Steven Mengelkoch. *Id.*, at pp. 96-98, RA 79-80.

Based on this information and according to standard procedure, Captain Mengelkoch filed a complaint on October 26, 1995, with the Department of Public Safety Internal Affairs Division. He reported that Bogren engaged in conduct unbecoming an officer.[3] Captain Mengelkoch met with Bogren to discuss the internal procedure following her criminal charges. He informed Bogren that the Internal Affairs Office would conduct an investigation. He also informed Bogren that she should have no contact with Johnson. Mengelkoch Dep. pp. 18-19, 25, RA 89-90.

After receiving the complaint, the Internal Affairs Division referred the case back to Captain Mengelkoch for investigation and he appointed Lt. Fraser as a temporary investigator to complete the investigation into the complaint because Fraser had taken the initial citizen complaint. Fraser Dep. at pp. 96-98, RA 79-80. Lt. Fraser conducted the investigation in accordance with all applicable policies. On November 1, 1995, Lt. Fraser took taped statements from Johnson and Monica Halmon, a

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[3] Bogren took an oath "[t]o conduct [her]self at all times in accordance with the highest moral standards and never commit any act that will reflect discredit on the Minnesota State Patrol or any member thereof." Bogren Dep. 3/26/99, Ex. 30, RA 87.

witness to the incident. *Id.*, pp. 72, 127, RA 77, 81. Lt. Fraser also met with Bogren and her attorney, Joseph Marshall, and took her taped statement. *Id.*, p. 126, RA 81. Bogren also submitted a supplemental statement. Bogren Dep. Ex. 25, RA 70-75.

Based on his interview of Bogren, Lt. Fraser concluded that she was untruthful and evasive. Fraser Dep. Ex. 46, RA 82. Lt. Fraser's opinion is based on Bogren's responses to questions about her anger management counseling[4] and the status of her relationship with Johnson.[5] Accordingly, on November 3, 1995, the Internal

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[4] Initially, Bogren denied that she had ever sought anger management counseling.

TF: Do you know a female psychologist on the 3rd Floor of the Group Health Building on 27th and University [who] is an anger counselor?

AB: No.

Bogren Interview Transcript, Dep. Ex. 25, pp. 10-11, RA 51-52. After Ms. Bogren conferred with her attorney and Lt. Fraser redefined "anger counseling" as "seeing a counselor at anytime who specialized in anger or some how deals with it," Ms. Bogren stated: "In 1994, August 30th I went to an office on 27th and University and spoke with Sandra Neil and based on the profession that I was about to undertake at that time I was in the POCOP program, I requested of her to teach me effective ways of dealing with anger." *Id.*, at pp. 11-12, RA 52-53.

[5] AB: I'm not aware of anything happening approximately eight weeks ago that was a break up.

TF: So you don't consider yourself, for the last 8 weeks you consider yourself still a couple?

AB: No, um I considered us two individuals that had problems and had mutually decided to attempt work on our problem, exclusive of other male or females on each side, so we were like separated. *Id.*, at p. 24, RA 65; *see also Id.*, at p. 2, RA 43.

Affairs Division sustained the charges against Bogren. Fraser Dep. Ex. 46, RA 82. Eventually, Bogren pleaded guilty to petty misdemeanor criminal damage to property.

Subsequently, then Patrol Chief Michael Chabries made the initial decision to non-certify Bogren's appointment to the State Patrol. However, after being informed of the decision on November 8, 1995, Bogren's legal representative, Joseph Marshall, requested that the Patrol hold off non-certifying Ms. Bogren until he had a chance to look into the case before he advised his client on what to do. Mengelkoch Dep. at p. 28, RA 90. This request was granted. A meeting was then arranged on November 14, 1995, in which Mr. Marshall had an opportunity to meet with the union, as well as with Deputy Chief Halverson, to provide any information that may have a bearing on Bogren's situation and possibly change the decision. *Id.*, RA 90.

The decision to non-certify Bogren was based upon several deficiencies culminating in the incident involving her former boyfriend. In the opinion of Patrol supervisors, Bogren displayed inadequate skills during her field training. Initially, Bogren displayed difficulty in paying attention to traffic lights and stop signs; Trooper Polansky concluded that Bogren was unable to divide her attention among operating the squad car, listening to the radio, knowing where she was in relation to her partner, and monitoring traffic violations. Brian Polansky Aff. at ¶ 16, RA 93-94. During the last phase of training, Trooper Polansky noticed a regression, rather than improvement, in Bogren's driving. *Id.*, at ¶ 28, RA 96. Bogren violated traffic laws almost daily, including speeding unlawfully

and unnecessarily through residential neighborhoods, following other drivers too closely and failing to stop at stop signs and red metering lights. Bogren's driving raised concerns for her safety, the safety of her partners, the safety of the motoring public and the safety of pedestrians. *Id.*, at ¶¶ 22-25; 27 & 33, RA 94-97.

Bogren's poor driving was viewed as a serious problem. In addition to documenting Bogren's daily traffic violations, Trooper Polansky indicated on the final field training report that Bogren was "experiencing difficulty" with regard to her driving ability. Polansky Dep. Ex. 35, RA 100-101. Also, Trooper Polansky reported to Lt. Kutz that he was concerned about Bogren's driving, including excessive speed, driving through stop signs and lights, following too closely, and making unsafe lane changes. Al Kutz Aff. at ¶ 5, RA 103. Trooper Polansky recommended to Captain Mengelkoch and the Field Training Lieutenants that Bogren drive with another field training officer so that another trooper could observe her driving problems and offer remedial advice to correct this serious deficiency. Brian Polansky Aff., at ¶ 33, RA 97.

As documented in Lt. Kutz's "Supervisors Report of Trooper Contact" dated June 9, 1995, the Minnesota State Patrol was concerned because Bogren attempted to cover up an accident, rather than report it as policy required. Al Kutz Aff. at ¶ 9. RA 104. On approximately June 2, 1995, Lt. Dan Hilligoss notified Lt. Kutz that Bogren had been involved in an accident on May 24, 1995. *Id.*, ¶ 8, RA 104.

Trooper Beth Zeller informed Lt. Hilligoss, the lieutenant on duty, that "he might hear a different version of the accident from [Bogren] than the report that she

[Zeller] was going to submit." *Id.*, Ex. B, RA 107. Lt. Kutz interviewed Trooper Zeller and discovered that she heard Bogren contact the Department of Transportation to report a downed metering ramp light. *Id.*, at ¶ 10, RA 104. Trooper Zeller later observed Bogren parked next to the metering ramp light and asked her how it had been knocked down. *Id.*, RA 104. Bogren reported that she hit the light and Trooper Zeller informed her that she should file an accident report. *Id.* Trooper Zeller further relayed that she had to convince Bogren to file a report and that Bogren was unhappy about it. *Id.*

Based upon discussions with her supervisors with regard to her performance and the October 22, 1995, incident, Chabries affirmed his earlier decision to terminate Bogren. Michael Chabries Aff. at ¶ 3, RA 114.

ARGUMENT

I. Petitioner Failed To Raise The Issue Of The Evidentiary Effect Of An EEOC Letter At The Court Of Appeals And, Therefore, This Issue Has Not Been Preserved For Review By Certiorari.

Petitioner argues that an opinion letter from the local Equal Employment Opportunity Commission ("EEOC") agency should have been considered by the lower court in its determination of whether Petitioner had identified sufficient facts to survive a summary judgment motion. Petition at 8-13. Because Petitioner did not preserve this

issue by raising it either in the district court[6] or before the Court of Appeals, she has waived the issue and certiorari should not issue. *Sonzinsky v. U.S.*, 300 U.S. 506 (1937).

Even had Petitioner raised this issue, the court would have been correct to refuse to consider the EEOC letter as evidence. A review of the letter reveals that it is not probative in any way. The letter simply announces the signer's conclusion that Petitioner was discharged and subjected to a hostile work environment in violation of Title VII. Petitioner's App. A-39-40. The letter contains no discussion of evidence or law that would show that the decision had a factual and legal basis. Given these limitations, a court should refuse to consider the EEOC's determination as evidence. *See Goldberg v. B Green Co., Inc.*, 836 F.2d 845 (4th Cir. 1988) (holding that conclusory EEOC letter was insufficient to create genuine dispute of material fact).

II. The Court Of Appeals Properly Applied The Law In Affirming The District Court's Dismissal Of Petitioner's Case On Motion For Summary Judgment.

A. The Court Of Appeals Properly Analyzed The Facts And The Law According To Precedent.

Petitioner argues that the Court of Appeals did not follow the mandate of the Court in *Reeves v. Sanderson*,

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[6] The opinion letter was identified and quoted in the "Facts" portion of Petitioner's district court Memorandum in Opposition to Summary Judgment, but the legal issue was not advanced to the district court.

___ U.S. ___, 120 S. Ct. 2097 (2000) by failing to give appropriate credence to plaintiff's evidence[7] and by not disregarding colorable evidence of the defendant. Petition at 14. The gravamen of Petitioner's argument for this issue, however, is not based upon *Reeves*, but rather represents a compendium of what the Petitioner believes are errors by the Panel. With respect to Petitioner's "omnibus" argument, the decision of the Panel shows that at every stage of the burden-shifting analysis the Court of Appeals properly analyzed the evidence in the record, and carefully considered each of Petitioner's arguments.

B. The Determination Of The EEOC Was Not Argued To The Court Of Appeals.

Petitioner contends that the Panel ignored the determination of the EEOC. Petition at 17. As discussed in Part I, *supra*, this argument was not submitted to the Panel. Since the issue was not preserved, the Court should not address it.

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[7] Respondent is not waiving its right to object that facts identified in the Petition are not based upon admissible evidence. For example, Petitioner contends that the officer who investigated the criminal incident involving her former boyfriend had made statements about the Chief of the State Patrol. Petition at 18. Based upon the record before the Court of Appeals, these statements are not based upon admissible evidence.

C. Alleged Misrepresentation To The EEOC Was Not Argued To The Court of Appeals.

Petitioner argues that the Panel "failed to consider" an alleged misrepresentation to the EEOC as evidence of pretext. Petition at 17. Again, Petitioner failed to preserve this by raising it with the Court of Appeals. Since the issue was not preserved, the Court should not consider it.

D. The Panel Did Not Ignore Petitioner's Evidence Of Alleged Pattern Of Discriminatory Practice.

Petitioner argues that the Panel "ignored" her evidence of an alleged policy of discrimination. Petition at 18. The Panel's decision fully explored the "simplistic demographic evidence" which Petitioner proffered in an attempt to satisfy her pretext burden and discounted this evidence in conformance with established legal authority. Decision at 11, Petitioner's App. A-13.

E. The Panel Properly Concluded That Petitioner Failed To Show Pretext.

Petitioner argues that the Panel failed to consider evidence that alleged deficiencies in her performance were untrue. Petition at 20. The Panel considered Petitioner's argument that the supervisor's report contained "blatant lies and inaccuracies" and rejected her contentions. Petition A-12. The court stated:

> For the most part, the supervisors' report merely presents issues and concerns raised by other troopers during Bogren's probationary period, which are supported by the record, and summarizes the tea-cup incident at Johnson's

> home. We find no evidence supporting Bogren's assertion that the report contains blatant lies, included by her supervisors to justify her termination, nor any evidence related to the report's preparation which would cause a fact finder to question the explanation offered by the state.

In support of the Panel's reasoning and conclusion, it should be noted that Petitioner failed to offer evidence that the decision-maker, Colonel Chabries, was motivated by discriminatory animus. That is, Petitioner attributed none of the alleged lies or distortions to the actual decision-maker.[8] In addition, since there is a factual basis for the conclusion reached by the decision-maker, an attempt by Petitioner to litigate whether the infraction occurred is an invalid method for showing pretext. *Gill v. Reorganized School Dist.*, 32 F.3d 376, 379 (8th Cir. 1994). In addition, much of her argument appears to simply question the wisdom or soundness of the termination decision. Again, such an argument is irrelevant to the pretext analysis. *Davenport v. Riverview Gardens*, 30 F.3d 940, 944 (8th Cir. 1994).

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[8] For this reason Petitioner's reliance on *Keathley v. Ameritech Corp.*, 187 F.3d 915 (8th Cir. 1999) is misplaced. The *Keathley* Court correctly held that plaintiff had shown that the proffered reasons were not the actual reasons because, *inter alia*, similarly situated, non-protected class employees were treated differently and because the *decision-maker* had manifestly lied. *Id.*, 187 F.3d at 924.

F. The Panel Appropriately Considered Petitioner's Arguments With Respect To Disparate Treatment Of Comparable Non-Protected Class Employees.

Petitioner argues that the Panel "gave no weight" to Petitioner's comparison evidence. Petition at 25. The decision, however, shows that the Panel carefully analyzed the Petitioner's proffered evidence on this question. For example, the Panel carefully explained why non-probationary State Troopers were not, as a matter of law, similarly situated with the Petitioner, a probationary trooper. Decision at 8, Petitioner's App. A-10.

The Panel also properly and carefully analyzed Petitioner's proffered evidence with respect to probationary troopers. The Panel stated:

> We respectfully disagree with the district court's conclusion that Bogren only compared herself to nonprobationary troopers. On appeal, Bogren presents scant evidence that the patrol did not discipline several white male probationary officers when citizen complaints were lodged against the troopers or when disciplinary issues arose. The same probationary officers were also identified in Bogren's response to the state's memorandum in support of summary judgment. The state argues, and we agree, however, that the probationary-trooper evidence offered by Bogren is insufficient to establish pretext. "To be probative evidence of pretext, the misconduct of more leniently disciplined employees must be of 'comparable seriousness.' " *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994) (quoting *Lanear v. Safeway Grocery*, 843 F.2d 298, 301 (8th Cir. 1988)). Bogren presents no evidence

> that any of the probationary officers ever received a comparable criminal citation nor that concerns over their accountability, driving performance or tendency to prevaricate were raised during their probationary period. Nor does she show that they were involved in motor vehicle accidents while on patrol. Rather, the record reflects only that two probationary troopers received a single citizen complaint, both of which were investigated and found to be unsustained, and a third received two citizen complaints. Moreover, Bogren has not shown that the supervisor or supervisors responsible for her termination were also involved in the disciplinary action, or lack thereof, of the white male probationary officers. *See id.* (recognizing that individuals are generally not similarly situated when different decision makers are involved in the respective disciplinary action).

It should be noted that the State also produced evidence showing that probationary troopers were discharged for comparatively similar infractions. For example, Probationary Trooper Robert Starzl, a white male, was non-certified because he criticized the Patrol at a fishing contest dinner where members of other law enforcement entities were present. Anne Beers Aff. at 8, RA 123. Another example of this is Probationary Trooper David Hutchins, another white male. The culminating event for Hutchins' termination was his utilization of a paper clip as a tie bar. *Id.*, at 7, RA 122.

CONCLUSION

For all of the reasons described above, Petitioner respectfully requests that the Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Supreme Court, U.S.
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No. 00-1729

In the

Supreme Court of the United States

Ann Bogren,

Petitioner,

v.

The State of Minnesota; Department of Public Safety; Donald Davis, Commissioner of the Department of Public Safety, in his official capacity; Minnesota State Patrol; Ann Beers, Chief of the State Patrol, in her official capacity;

Lieutenant Thomas Fraser of the State Patrol, personally and individually; and Lieutenant Lori Hodapp of the State Patrol, personally and individually; and Lieutenant Colonel Stephen Mengelkoch of the State Patrol, personally and individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

I. The judicial system will not be burdened by a rule of law that credits the EEOC's findings of discrimination violations, but by courts' determinations that discredit the agency and thereby discourage employers and employees from deferring to the EEOC's expertise and resolving the claims outside the court system.

The EEOC is not, as respondents contend, in the business of making probable cause findings and determinations of violations of Title VII in "loads" of "meritless" cases, so heavy as to cause the judicial system to "buckle" under the weight were the cases to be tried; the EEOC is in the business of carrying out Congress's intent that meritorious discrimination cases be identified by the EEOC's trained investigators and then resolved through the agency's conciliation process rather than through the court system. In *Occidental Life Insurance v. EEOC*, 432 U.S. 355, 367-368 (1977), the Court explained:

> When Congress first enacted Title VII in 1964 it selected 'cooperation and voluntary compliance. . . as the preferred means for achieving' the goal of equality of employment opportunities. To this end, Congress created the EEOC and established an administrative procedure whereby the EEOC 'would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.'. . . [U]nder the procedural structure created by the 1972 amendments, the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating

claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion.

The Third Circuit, in *Burgh v. Borough Council of the Borough of Montrose*, 2001 U.S. App. LEXIS 10835, just recently relied upon *Occidental* to rule that the plaintiff's case was not barred by a state limitations statute where: the plaintiff's complaint of discrimination was docketed by the EEOC on March 20, 1995; the plaintiff retained an attorney, sometime prior to October 1998, who wrote a letter to the EEOC requesting the agency to issue a right-to-sue letter; the plaintiff received a right-to-sue letter from the EEOC on December 1, 1998; and the plaintiff filed suit three days later. The court reasoned that the limitations scheme provided for in Title VII – 90 days from receipt of the right-to-sue letter from the EEOC – is "consistent with Congress's intent that most complaints be resolved through the EEOC rather than by private lawsuits." Therefore, even though the plaintiff filed suit over three years after his complaint was filed with the EEOC, the court concluded the complaint was timely filed. Because "Congress wanted cooperation and voluntary compliance to be the primary means of resolving claims in an informal and noncoercive manner," the *Burgh* court preserved "this goal of resolving problems by conciliation," which it understood as "better met by enacting a limitations period for filing a court action that runs from the receipt of the right-to-sue letter at the end of the administrative process rather than from the date of the unlawful employment practice."

In addition to reducing the number of litigated cases through the settling of disputes by "conference, conciliation, and persuasion" in probable cause cases, the EEOC process also discourages litigation by complainants who defer to the EEOC's findings of no probable cause and forgo a pursuit of their claims in court. The EEOC can succeed in fulfilling its various roles only so long as it is perceived by employers and

employees as a respected, highly regarded agency, with acknowledged expertise in analyzing discrimination claims. Such a perception is hardly fostered by a federal court's determination, as in the petitioner's case, that no reasonable fact finder could find discrimination, where the EEOC has already found discrimination. Obviously, the opposite perception is fostered. The less the courts credit the EEOC's determinations, the less inclined employers will be to cooperate in the EEOC's conciliation and settlement procedures and to respond to employees' EEOC charges with accurate, precise, truthful statements.

Significantly, the State defendant did not respond to petitioner's EEOC charge with accurate, precise, truthful statements. Respondents assert that the State's misrepresentation to the EEOC that petitioner was "arrested" is a "mistaken" statement that "in no way affected respondents' decision and therefore, does not support petitioner's pretext argument" and is "in no way sufficient to find that respondents' asserted justifications for discharge were false." The mistaken statement, however, was the "first and foremost" justification the State gave to the EEOC for terminating the petitioner. (Petitioner's Appendix, at 101). Respondents' failure to attach any significance to the State's untruthful response to the EEOC, together with the State's failure to have taken a minimal amount of care in responding to petitioner's charge to give the EEOC honest, accurate reasons for petitioner's termination, reflect respondents' and the State's disregard for the EEOC investigative process and explain respondents' viewpoint that the EEOC is writing letters of violation and making probable cause determinations in "loads" of meritless cases. As this viewpoint, completely discrediting to the EEOC and completely unsupported, is the premise for respondents' position that an EEOC letter of violation does not at least mean that reasonable people could disagree whether an employer was motivated by a

discriminatory attitude, respondents' position is likewise unsupported.

Respondents' attempt to support their position through cases declining *per se* admissibility of EEOC findings fails because those cases focus on the probative value of the EEOC report versus the danger of unfair prejudice to one of the parties. Whether the report would be helpful to the jury or whether it is, for example, merely conclusory and therefore not helpful, *see Johnson v. Yellow Freight System, Inc.*, 734 F.2d 1304 (8th Cir. 1984), is a very different question than whether a finding in favor of the plaintiff demonstrates that a reasonable person reviewing the facts could find discrimination. In *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488 (9th Cir. 1986), the Ninth Circuit held that its rule of *per se* admissibility applicable to probable cause determinations did not apply to letters of violation, not because a letter of violation is not probative of discrimination, but rather, because it is such a definitive statement by the EEOC that a violation of federal law occurred that the admission of the finding could prejudice the employer. The court explained:

> The difference between [a probable cause determination and a letter of violation] becomes critical when considering the potential for prejudicial impact on a jury. In a letter of violation the EEOC concludes that a violation of Title VII has occurred, whereas in a probable cause determination the EEOC determines only that there is probable cause to conclude that a violation of Title VII has occurred. A finding of probable cause does not suggest to the jury that the EEOC has already determined that there has been a violation. . . . A letter of violation, however, represents a determination by the EEOC that a violation of the Act has occurred and thus

> results in a much greater possibility of unfair prejudice.

In *Paolitto v. John Brown E. & C., Inc.*, 151 F.3d 60 (2nd Cir. 1998), relying on *Gilchrist*, the court excluded the EEOC's finding of "insufficient evidence" because of the possibility of unfair prejudice to the plaintiff:

> In many respects, this finding – which amounts to essentially a finding of no probable cause – resembles a categorical legal conclusion akin to a letter of violation. A finding of probable cause states only that a case is a close one, whereas a finding of no probable cause, like a letter of violation, conclusively resolves the administrative charge.

Respondents also fail to support their position through their discussion of *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972). The court's ruling that an EEOC report is "to be given no more weight than any other testimony given at trial" is not relevant to the question petitioner has presented to the Court. Petitioner is not proposing that an EEOC letter of violation means a plaintiff wins her case at trial, but only that it must mean that reasonable people could disagree whether she should win her case.

II. The petitioner may raise before this Court the question whether the EEOC's letter of violation, finding that the evidence in petitioner's case establishes discrimination, precluded the Eighth Circuit's ruling that no reasonable fact finder could find discrimination.

Petitioner should be permitted to present to this Court the question whether the EEOC's letter of violation, finding that the evidence in petitioner's case establishes discrimination,

precluded the Eighth Circuit's ruling that no reasonable fact finder could find discrimination. Petitioner wrote her brief to the Eighth Circuit in November of 1999. In the brief, she clearly informed the court, in the statement of facts, that the EEOC had found a violation of discrimination law. Petitioner quoted from the EEOC's letter of violation. To petitioner's knowledge, the only Eighth Circuit case in which the court has ruled that an EEOC finding of probable cause precludes summary judgment is *Bassett v. City of Minneapolis*, 211 F.3d 1097 (8th Cir. 2000). The court had not yet decided this case at the time petitioner wrote her brief, though it was decided before oral argument and before the panel filed its decision on December 22, 2000. Relying on *Bassett*, petitioner raised the EEOC issue that she has raised to this Court in her *en banc* petition to the Eighth Circuit. Petitioner's *en banc* petition was denied on February 15, 2001. *Cervantes v. Walmart*, 2001 U.S. App. LEXIS 63 (10th Cir.), which created conflict within the Tenth Circuit, was decided on January 3, 2001. *Coleman v. Quaker Oats*, 232 F.3d 1271 (9th Cir. 2000), which created conflict within the Ninth Circuit and is in conflict with *Cervantes* and *Bassett*, was decided on November 20, 2000.

A criterion for this Court to grant a petition for certiorari is whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R.10(a). As petitioner explained in her petition, the Eighth Circuit panel in her case entered a decision in conflict with law in its own circuit and in other circuits, and there is conflicting law on this issue among the circuits and within the circuits. A second criterion for this Court to grant a petition for certiorari is whether an issue in the case is "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R.10(c). As petitioner has discussed in this brief and in her petition, judicial rulings that no reasonable fact finder could find discrimination, where the

EEOC has found that the evidence "establishes" discrimination, will bring discredit to the EEOC and harm the EEOC's reputation and status, authority and influence, and ability to carry out its functions and achieve the goals that Congress set for the agency upon creating it. Whether courts should view EEOC findings of violations as "demonstrat[ing] that upon distillation of all the evidence presented, reasonable minds could disagree over the material fact of . . . intentional discrimination," *Bassett*, or, at a minimum, discuss the EEOC report and the court's reasons for affording it no weight, *see Cervantes*, is an important federal question requiring uniformity within and among the circuits.

III. Respondents' defense of the panel's decision, through a misunderstanding of settled principles of law concerning the standard of review of a motion for summary judgment and the standard of appellate review of a grant of summary judgment, along with a failure to give credence to evidence favoring petitioner while crediting evidence favoring defendants, highlights the panel's departure from the accepted and usual course of summary judgment proceedings, as confirmed in *Reeves v. Sanderson*.

In disagreeing with petitioner that the panel's method of analyzing the petitioner's case violated *Reeves*, respondents proceed from a faulty understanding of the summary judgment standard and the standard for appellate review of a district court's grant of summary judgment. Respondents erroneously assert that "this Court cannot take away the trial court's function of weighing the evidence," and the panel "could not duplicate the district court's function by making its own determination of facts and reversing even if it would have decided the case differently." Respondents disregard that appellate review of the district court's grant of summary judgment is *de novo*. Respondents also disregard that a court

deciding a summary judgment motion is decidedly not a fact finder and absolutely not permitted to weigh the evidence. *Reeves v. Sanderson*, 530 U.S. 133, 150-151 (2000); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-555 (1990). Clearly, the panel was required to make its own determination whether the petitioner's case presented genuine issues of material fact to be decided by the jury. And clearly, as petitioner asserted in her brief, the panel was required by *Reeves* to discount all evidence favorable to the defendants that the jury is not required to believe and to give credence to the evidence favoring the petitioner and only to the evidence supporting defendants that is "uncontradicted and unimpeached, at least to the extent that it comes from disinterested witnesses." *Reeves.*

Respondents answer the petitioner's question to the Court whether the panel so far departed from the usual and accepted course of summary judgment proceedings by simply reciting the alleged "deficiencies" that were suddenly attributed to petitioner and suddenly documented when respondents and the State took advantage of the teacup incident to fire the petitioner. Respondents fail to acknowledge the evidence favoring petitioner, creating genuine issues of material fact, and fail to reconcile all of this evidence with their repeated conclusion that petitioner presented no evidence from which a reasonable fact finder could disbelieve the respondents' justifications for her termination. For example, respondents attack the petitioner's credibility in the accident reporting incident but fail to respond to the fact that the white female trooper's credibility was accepted over the petitioner's credibility. Respondents accuse the petitioner of being evasive and untruthful in the investigation, but fail to respond to petitioner's evidence that Fraser's conclusions were based on the word of Johnson, and fail to look beyond Fraser's accusations to see that petitioner was not untruthful in responding to Fraser's questions, even those questions designed to probe into the petitioner's personal and private

life in search of some reason to fire her. Respondents allege that petitioner presented no evidence that any false accusations of dishonesty were discriminatory, but fail to account for petitioner's evidence that white probationary troopers' credibility was routinely accepted, while petitioner's credibility was routinely and automatically doubted. Respondents defend their "business judgment" in firing the petitioner based upon their "concern" that petitioner might present a disciplinary problem after certification due to her conduct in dropping the teacups, but fail to explain their lack of concern for the future disciplinary problems of the white male trooper who grabbed the citizen's neck and threatened him or the white male trooper who pushed the citizen's head toward the steering column to teach him a lesson about seat-belts. Respondents maintain that they did not have to take the "chance" that petitioner would "improve" when certified, though fail to acknowledge her solid performance record and fail to explain why they were not taking any chances in retaining the white male trooper who responded to an accident scene intoxicated or the white male troopers with the citizen complaints about on-duty intimidating and threatening behavior toward motorists.

Respondents also contend that the petitioner expected the panel to fault defendants for "fail[ing] to credit the many positive comments in her performance evaluations," whereas petitioner asserted that the panel had to consider the comments in her performance evaluations that proved the alleged after-the-fact "deficiencies" could not have been true. Respondents contend that petitioner's commendation in the academy by her instructors for her "outstanding driving skills" is meaningless because field performance occurs at a "real life pace" and "does not allow for artificial protections," but nothing in the record supports respondents' disparagement of petitioner's commendation and nothing suggests that petitioner received the commendation for anything other than "real life" driving in a "real life" car.

Respondents also misrepresent petitioner's performance evaluations by characterizing the evaluations as illustrative of petitioner's "inadequacies" and as "establish[ing]" that petitioner was not as capable a trooper in the field, when the petitioner received nine scores of "above average," 24 scores of "satisfactory," and only two scores of "unsatisfactory" in a total of 35 scores.

Finally, respondents do not begin to acknowledge petitioner's evidence of the discriminatory attitudes of Fraser and Hodapp and the evidence of discrimination toward black troopers in the Patrol, as detailed by Mel Lockhart. Respondents do not even mention Mel Lockhart's name, and yet they cast aside petitioner's statistical evidence as merely "generic" and make conclusory arguments, with no analysis of the evidence, that statistical evidence "will rarely suffice to rebut an employer's legitimate, nondiscriminatory reasons for a particular adverse employment action." Respondents' arguments are circular. The whole point of petitioner's statistical evidence, in conjunction with the evidence of the State's discriminatory treatment of Lockhart and the other black troopers, was to prove the discriminatory motives behind the State's and respondents' adverse treatment of the petitioner. Petitioner clearly did not have to first prove the discriminatory motives in order for the court to consider the evidence proving those motives.

Summary judgment should not be granted "unless the evidence could not support any reasonable inference of discrimination." *Keathley v. Ameritech*, 187 F.3d 915, 919 (8th Cir. 1999). "The court must draw all reasonable inferences in favor of the nonmoving party." *Reeves*, at 150. In Judge Lay's words, in his dissenting opinion in *Heaser v. Toro Co.*, 247 F.3d 826, 834 (8th Cir. 2001):

> [I]n order to grant summary judgment all the evidence must point one way and be susceptible of no reasonable inferences sustaining the position of

> the non-moving party. The obvious corollary to this principle is that a motion for summary judgment requires the facts to be viewed in the light most favorable to the plaintiff by affording a plaintiff the benefit of all factual inferences. These settled principles of law need no citation.

As the *Paolitto* court explained, a letter of violation "conclusively resolves the administrative charge" in favor of the employee, and a finding of probable cause means that a case is "a close one." By definition, cases in which violations are close calls or are conclusive survive a correct application of the summary judgment standard. While the panel did not misstate the applicable legal standards, as the respondents did, the panel nevertheless failed to apply the correct standards it stated. Drawing all inferences and resolving all factual issues in favor of the defendants; giving credence to the evidence favoring the defendants that was not uncontradicted, did not come from disinterested witnesses, and the jury was not required to believe; and failing to give credence to the evidence supporting the petitioner, the panel departed from the accepted and usual course of judicial proceedings. The petitioner respectfully submits that the reasons she has set forth in her petition and in this brief, in request of the Court's grant of review on a writ of certiorari, are compelling Petitioner respectfully requests the Court to grant her petition.

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